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No. 86-892

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SAN MARCOS COUNTY
WATER DISTRICT,

Petitioner,

vs.

SAN MARCOS UNIFIED
SCHOOL DISTRICT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the arbitrary requirement of the California Supreme Court that private customers of petitioner Water District pay for all of the capital improvements of the Water District, including the share required for and used by public entities, such as respondent School District, violate the guarantees of the Taking Clause of the Fifth Amendment against such uncompensated exactions?

2. Does the arbitrary classification of payers for use of the Water District's capital improvements into full-paying private customers and non-paying public entity customers lack a legitimate purpose and thereby violate the Equal Protection Clause of the Fourteenth Amendment?

3. Where not insubstantial constitutional issues such as violation of the Taking Clause of the Fifth Amendment and violation of the Equal Protection Clause of the Fourteenth Amendment are raised, is it not the heavy obligation of the courts to interpret state statutes, if fairly possible, to avoid the constitutional questions?

4. Have not the California trial court and the California intermediate appellate court clearly demonstrated that it is fairly possible — indeed convincingly preferable — to interpret the state statutes to avoid uncompensated exactions and arbitrary classifications which would violate the Fifth and Fourteenth Amendments?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

SAN MARCOS COUNTY WATER DISTRICT,

Petitioner,

vs.

SAN MARCOS UNIFIED SCHOOL DISTRICT,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner San Marcos County Water District respectfully prays that a writ of certiorari issue to review the order of the California Supreme Court excusing respondent San Marcos Unified School District from paying a capacity fee based upon projected use even though it utilizes the petitioner's sewer facilities, and imposing the entire burden of cost of capital improvements upon the *private* customers of petitioner.

OPINIONS BELOW

The decision of the California Supreme Court issued on July 21, 1986 reversing the judgment of the trial court and is set forth in Appendix A, *infra*. The Opinion of the Court of Appeal is attached as Appendix B, and the Judgment of the trial court is attached as Appendix C.

JURISDICTION

The decision of the California Supreme Court reversing the judgment of the trial court was filed on July 21, 1986. A timely petition for rehearing was filed, and the California Supreme Court denied rehearing by order filed August 28, 1986. Jurisdiction of this Court is proper pursuant to 28 U.S.C.A. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case was tried as an Agreed Case pursuant to California Code of Civil Procedure § 1138. *See*, Complaint on Agreed Case, Appendix G, for full details.

Briefly, petitioner Water District provides sewer services, and respondent School District provides educational services for the San Marcos area in San Diego County, California. Although the boundaries of the two districts are not contiguous, they serve roughly the same community. All of the currently used school sites of the School District are within the Water District.

Beginning in 1971, the School District applied for sewer service and connected its school sites and facilities to the Water District's sewer system, incurring various charges from the Water District and paying capacity fees. The Water District charges *all customers* three different types of fees. A *connection* [cost to install] *fee* is charged when a customer's property is initially connected to Water District's sewer lines. A *monthly sewer service charge* is imposed to cover operation, maintenance, and sewage treatment and disposal costs based on the amount of sewage discharged monthly. A *capacity* [user] *fee* is also charged, which, like the monthly service charge, is based on quantity of sewage discharged. For schools, the capacity fee charge is equal to $2,400.00 for each 25 students, faculty, staff, etc., assigned to the school.

The capacity [user] fee is a primary source of funds for the development of replacement capacity for that

committed to the user and is set at a level which will defray the costs of providing replacement sewage treatment and/or reclamation facilities, major trunk and transmission pipelines, and facilities for pumping, as such facilities are needed. *It is not used for local benefit (assessment) facilities.*

The sole question presented to the trial court and on appeal is whether the Water District may validly collect the capacity fee — user fee — from the School District, *an ad valorem property tax-exempt entity.*

There is no dispute as to the Water District's authority to collect or the School District's obligations to pay the connection fees and monthly service charges. Nor is there any contention by the School District that the capacity fee it is charged is any different from the capacity fees charged non-property-tax-exempt entities.

The Water District's capacity fee is imposed pursuant to the provisions of the California Water Code, Education Code, and Health and Safety Code. California Health and Safety Code § 5471 provides in relevant part, as follows:

> Any entity shall have power . . . to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges, including sewer standby or immediate availability charges, for services and facilities furnished by it, either within or without its territorial limits, in connection with its sanitation or sewerage . . . . Revenues derived under the provisions in this section, shall be *used only* for the acquisition, construction, reconstruction, maintenance and operation of water systems and sanitation or sewerage facilities . . . ; provided, however, that such revenue shall *not be used* for the acquisition or construction of new

> local sewers or laterals as distinguished from main trunk, interceptor and out-fall sewers. [Emphasis supplied; Ergo, *not used for local assessment-type facilities*].

The School District relied primarily on a series of three cases, which, with minor factual variations, address the question whether a local government entity which operates a sewer system can collect a fee designed to defray the costs of capital improvements from public entities exempt from the *ad valorem property tax* (California Constitution, Article 13, § 3). *See*: *County of Riverside v. Idyllwild County Water Dist.*, 84 Cal.App.3d 655 (1978); *Regents of the University of California v. City of Los Angeles*, 100 Cal.App.3d 547 (1979) [*Regents I*]; *Regents of the University of California v. City of Los Angeles*, 148 Cal.App.3d 451 (1983) [*Regents II*]. In each case, the California appellate court concluded that to the extent the fee was used to finance capital improvements, it constituted a special assessment which could not be collected from ad valorem property tax-exempt entities absent legislative authorization.

Water District presented alternative contentions. It contends the capacity fee is not a special assessment, but rather, *a user fee*; the fact that the School District is exempt from an ad valorem property tax is not relevant. Alternatively, if the capacity fee is a special assessment, legislative authorization for the assessment is provided by the California Education Code, the California Water Code, and the California Health and Safety Code. California Education Code § 39613 empowers school districts to *construct their own sewer systems or to contract for the right to utilize sewer systems constructed by others*; viz:

> In addition to the other powers granted, the governing body of each school district may provide sewers and drains adequate to treat and/or dispose of sewage and drainage on or away from each school property. For this purpose it may construct adequate systems or *acquire adequate disposal rights* in systems constructed or to be constructed by others for these purposes without regard to their proximity. The cost thereof may be paid from the building fund, including any bond moneys therein. [Emphasis supplied.]

The construction of a sewer system by a school district involves capital costs. The alternative is for a school district to "contract" for sewer disposal rights — pay a user fee based on capital costs to replace the capacity committed to and used by the School District in the sewer system owned by another agency. The School District *voluntarily* pursued the latter alternative, paid capacity fees from 1971 to 1979, but now refuses to pay the fees while continuing to use increasing amounts of Water District's sewer capacity.

A user [capacity] fee for tax-exempt entities is specifically authorized with the enactment of California Water Code § 31101.5 in 1982. [Effective January 1, 1983: "A district may supply sewage and waste services to property not subject to district taxes at special rates, terms, and conditions as are determined by the board for the services."] (Cf. California Water Code § 71670.5; *Carlton Santee Corp. v. Padre Dam Mun. Water Dist.*, 120 Cal.App.3d 14, 30 (1981).)

The trial court ruled there was a valid contract obligating School District to pay capacity [user] fees to Water District. School District appealed.

The California intermediate appellate court affirmed the judgment of the trial court, holding that a capacity [user] fee is a valid user charge (as contended by Water District) and not an invalid assessment (as contended by School District). School District petitioned the California Supreme Court for review and review was granted.

The California Supreme Court reversed the judgment of the trial court and the decision of the Court of Appeal, holding that the capacity [user] fee was a special assessment not authorized by the California Legislature and that the *private* customers of Water District must pay the entire cost of capital improvements, including those used by public entities, such as School District.

Water District raised its federal constitutional objections at the earliest stage the constitutional violations manifested and documented its federal constitutional objection by post-argument brief (Appendix E) and Petition for Rehearing (Appendix D).

The California Supreme Court refused to address Water District's federal constitutional objections and rehearing was denied.

The issue here involved is one of enormous statewide importance in California and many, many millions of dollars are ultimately involved unless the proper constitutional restraints are imposed by this Court and the misdirection of the California Supreme Court righted.

ARGUMENT

I

IT IS A CARDINAL PRINCIPLE OF THIS COURT TO INTERPRET LEGISLATION, IF FAIRLY POSSIBLE, TO AVOID CONSTITUTIONAL QUESTIONS

This Court has frequently stated a controlling rule of practice in statutory interpretation — indeed, a cardinal principle — to interpret a statute, if fairly possible, to avoid a constitutional question. For example, in the case of *United States v. Security Industrial Bank*, 459 U.S. 70, 103 S.Ct. 407 (1982), this Court declared:

> We consider the statutory question because of the "cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided." 459 U.S. 78, 103 S.Ct. 412 (1982).

In concluding, this Court stated:

> . . . "we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the" taking clause. 459 U.S. 82, 103 S.Ct. 414 (1982).

Similarly, in *Califano v. Yamasaki*, 442 U.S. 682, 99 S.Ct. 2545 (1979), this Court declared:

> And if "a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided," *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932), a

court should adopt that construction.
442 U.S. at 693, 99 S.Ct. at 2553.

See, also, *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285 (1932).

The California Supreme Court is no stranger to this important principle. Indeed, in deciding a case only one month before the instant case was decided, the California Supreme Court acknowledged:

> Finally, today's conclusion is compelled by the precept "that a court, when faced with an ambiguous statute that raises serious constitutional questions, should endeavor to construe the statute in a manner which *avoids* any doubt concerning its validity." (Citations.) (Emphasis original.) *Young v. Haines*, 41 Cal.3d 883, 898 (1986).

Yet, in this case, despite the urgings of petitioner at oral argument, by post-argument briefing, and on petition for rehearing, the California Supreme disregarded its acknowledged cardinal precept and navigated into troubled constitutional waters raising "difficult and sensitive questions arising out of the guarantees of the Taking Clause" (*United States v. Security Industrial Bank, supra*) and similar serious questions regarding equal protection.

II

THE DECISION OF THE CALIFORNIA SUPREME COURT MANDATES A TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION (OR ANY COMPENSATION) IN DIRECT VIOLATION OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION

While steadfastly refusing to address the federal constitutional issues raised by petitioner, the California Supreme Court was candid enough in its opinion to project the practical effect of its decision:

> Our conclusion does not mean that the water district cannot collect money for capital improvements from its customers; it simply means that the *private* customers will pay the entire cost of capital improvements. Slip Opinion, p. A-2, Appendix A. (emphasis original).

Put a little more directly, the practical effect of the decision of the California Supreme Court is to create for public entities and users such as the respondent School District a right of use in the sewer system, *without paying for it.* In short, the California Supreme Court decision attempts to transform private property into public property without compensation.

This Court has dealt with a number of situations in the past where the same objective was evident — whether for noble reasons or by candid admission or subterfuge or otherwise, private property was taken by the government without compensation. The consistent thread of the "Taking Clause" cases arising under the Fifth Amendment

of the United States Constitution is there is no "set formula" and ordinarily the Court must engage in "essentially ad hoc, factual inquiries." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S.Ct. 3164, 3171 (1982).

This Court has found numerous types of tangible and intangible property to be property for purposes of the Fifth Amendment's Taking Clause. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 2873 (1984), this Court summarized:

> Although this Court has never squarely addressed the question whether a person can have a property interest in a trade secret, which is admittedly intangible, the Court has found other types of intangible interests to be property for purposes of the Fifth Amendment's Taking Clause. *See, e.g., Armstrong v. United States*, 364 U.S. 40, 44, 46, 80 S.Ct. 1563, 1566-67, 4 L.Ed.2d 1554 (1960) (materialman's lien provided for under Maine law protected by Taking Clause); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602, 55 S.Ct. 854, 866-69, 79 L.Ed. 1593 (1935) (real estate lien protected); *Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934) (valid contracts are property within meaning of the Taking Clause). That intangible property rights protected by state law are deserving of protection of the Taking Clause has long been implicit in the thinking of this Court:
>
> > "It is conceivable that [the term 'property' in the Taking Clause] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights

> recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter." 467 U.S. 986 , 104 S.Ct. 2873, 2874.

The cases have made it clear that the assessment base or the capacity of a special district, such as Water District, to collect from others to defray various costs and expenses is a property interest, the taking of which requires compensation. *See, United States v. 129.4 Acres of Land*, 789 F.2d 715 (9th Cir. 1986); *United States v. 129.4 Acres of Land*, 572 F.2d 1385 (9th Cir. 1978); and *Adaman Mutual Water Co. v. United States*, 278 F.2d 842 (9th Cir. 1960).

Despite the endless variety of Taking Clause cases, to find a close analogue to the instant case, we need look no further than *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446 (1980). In *Webb's Fabulous Pharmacies, supra*, as here, we have

- A state statute (or statutes) drawn into question.
- An attempt to transform private property into public property without compensation in reliance upon the statute.
- The decision of the highest state court interpreting the statute to support such a result.

In determining that the private entity and not the public entity was entitled to the interest accruing on an interpleader fund deposit in the registry of a county court, this Court provided a primer of principles applicable to disputes such as the one now before this Court:

The pertinent words of the Fifth Amendment of the Constitution of the United States are the familiar ones: "Nor shall private property be taken for public use, without just compensation." That prohibition, of course, applies against the States through the Fourteenth Amendment. (Citations.) Our task is to determine whether the second exaction by Seminole County amounts to a "taking" — it was obviously uncompensated — within the Amendment's proscription.

. . . .

"Here, however, Seminole County has not merely adjusted the benefits and burdens of economic life to promote the common good (citation). *Rather, the exaction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts.* Indeed, the Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. (Citation.)

. . . .

Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the County seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use

of the fund for the period in which it is held in the registry.

To put it another way: A State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power. 449 U.S. at 160, 163-64, 101 S.Ct. at 450, 452 (emphasis added).

Here, too, by interpretation of state statutes, the highest state court has made an exaction which

- "Is a forced contribution to general governmental revenues and . . . is not reasonably related to the costs of [use]".
- . . . "[forces] some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole."
- "Seeks to accomplish its result simply by recharacterizing" the obligation.
- Is, in substance and practical effect, nothing more than an attempt to transform private property into public property without compensation.

Both the trial court and the intermediate appellate court in California found a reasonable means of interpretation to avoid this constitutional dilemma. The California Supreme Court remained oblivious and insensitive to the issue and its decision cannot stand. This is the very thing that the Taking Clause of the Fifth Amendment was meant to prevent. This Court must intervene because the state statutes, as interpreted by the state's highest court, to paraphrase again

the words of *Webb's Fabulous Pharmacies, supra* — has the practical effect of appropriating for the [School District] the value of the [contributions of private customers of the Water District]. 449 U.S. 164, 101 S.Ct. 452.

III

THE DECISION OF THE CALIFORNIA SUPREME COURT MANDATES A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION

A. The Requirement of Equal Protection.

The equal protection clause of the Fourteenth Amendment of the United States Constitution *commands* that no state shall deny any person the equal protection of the laws. *City of Cleburne v. Cleburne Living Center*, ___ U.S. ___ , 105 S.Ct. 3249, 3254 (1985). This requires that "all persons similarly circumstanced shall be treated alike." *Tyler v. Doe*, 451 U.S. 202, 216 (1982); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

As this Court noted in *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251 (1971):

> The Equal Protection Clause of [the Fourteenth] Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference

having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920). 404 U.S. at 75-76, 92 S.Ct. at 253-54.

B. The Classification.

The California Supreme Court's decision mandates that "private customers" of the area served by the Water District are subject to discrimination — they must pay taxes to support the schools; pay capacity fees for their own use and as an added exaction, an additional sum for the *entire cost of capital improvements provided by the Water District for the use of the School District.*

Persons residing outside the water district who use the school (public hospital, prison, etc.) do not pay the additional exaction. There is no rational basis for the difference. It rests on chance, the place of residence, and the situs of the public entity. This is contrary to the constitutional doctrine of equal protection of the laws.

C. The Classification Fails the Equal Protection Test.

The requirement to pay the additional exaction is not based on ability to pay. It is not levied statewide on a uniform basis. It imposes costs on the local community which, as mandated by the California Supreme Court in *Serrano v. Priest*, 18 Cal.3d 728 (1976), are the responsibility of the state to obviate local financing as a violation of equal protection in education. The cost of building and operating schools is a state, not local, responsibility. Under the state

statutory scheme, the state has the funds and system to meet this duty.

To justify the difference in classification between those who must pay the additional exaction and those not paying it, there must be a rational basis for the difference. This requires (l) a legitimate purpose, and (2) a classification which promotes the purpose. *Hoffman v. United States*, 767 F.2d 1431, 1436-1437 (9th Cir. 1985).

The purported purpose of the state court-created (not a legislative creation) *implied* exemption is to avoid impairment of the exercise of government powers.

The historical basis for a tax or assessment exemption is the prohibition against enforcing a lien on public property (selling the property to enforce the lien). That rationale has no application to a sewer capacity fee. A user fee is not for a lien.

A public agency is not subject to a mechanic's *lien*, but a public agency does not get capital improvement benefits for free; a "*stop notice*" is used to extract payment, not a lien. California Code of Civil Procedure §§ 3179-3214. *The stop notice does not become a lien merely by serving the same purpose — to enforce payment.* No valid purpose emerges.

The other reason for an exemption from *ad valorem* taxation is that the object of taxation is revenue and none results from state taxation of its own property. *Eisley v. Mohan*, 31 Cal.2d 637, 642 (1948). That is not the issue here. At bench the question is *which residents are the source of funds to pay the capacity fee* for the School District.

Factually, there is no impairment of the school function in this case. There is no attempt to regulate or impose liens or levy an *ad valorem* tax on the school. There is aid, not impairment, for education by providing sewer facilities at far less cost than the school could provide the facilities, the

alternative required by California Education Code § 39613. The School District paid fees from 1971 to 1979 without impairing education and then stopped payment on a legal, not factual impairment basis. The intermediate appellate court decision demonstrates conclusively and at length that sister states pay user-impact fees and the functioning of their government is not impaired.

There are *no facts* in this record showing that education (or other government functions) will be impaired by paying user (capacity) fees. The belated $66.24 million self-serving cost statement, by the Los Angeles Unified School District, is unaudited and based on speculation and conjecture. It is not based on the Los Angeles capacity fee nor related to incremental payments over a period of time. It is not in the Agreed Case nor subject to judicial notice and is not properly before this Court as a basis for decision any more than the comparable cost-fee relationship excluded by the California Supreme Court. Slip Opinion, pp. A-17, 18, Appendix A.

There being no valid purpose served by the distinction of classification of payers of the additional exaction, , *i.e.* private parties, and nonpayers of the exaction, there is a denial of equal protection of the laws as defined by this Court.

An attempt to surcharge private users to pay the School District's fee would be a forbidden special tax. Government Code §§ 50076 and 54992 (charges exceeding the reasonable cost of providing the service are a "special tax" requiring a two-thirds voter approval). *Beaumont Investors v. Beaumont Cherry Valley Water District*, 165 Cal.App.3d 287 (1985); California Constitution, Articles 13A and 13B.

This is not a case of exchanging tax dollars between public agencies, but a case of *which citizens* — consistent

with the federal and state constitutions and state statutes — must pay the bill.

There is no need for (or purpose served by) this classification. The state has funding sources of a magnitude not applicable to the Water District or residents of the Water District. Illustratively, the state is known to have an excellent bond rating and the ability to spread costs over a wide population base. The state is responsible for funding education. In addition to the lottery, the state has a fund balance, as of June 30, 1985 of $1,400,210,818.00, *State of California Annual Report*, 1984-85 Fiscal Year, pp. A-8 and A-9 (Exhibits A-1 and A-2 to Petition for Rehearing, Appendix D), an increase from $490,621,849.00 at the beginning of the period June 20, 1984. (This impartial source is not a party to this litigation, as is the self-serving speculation of Amicus Los Angeles Unified School District cited by the California Supreme Court in Footnote 2, Slip Opinion, p. A-4, Appendix A.)

Consistent with the cardinal principle of interpretation, the statutes must be interpreted to avoid this untenable classification. The decisions of the trial court and the intermediate appellate court clearly demonstrate that such an interpretation is fairly possible.

CONCLUSION

This Court in *Webb's Fabulous Pharmacies, supra,* laid down a clear blueprint for protection from arbitrary exactions by government. The blueprint fits the instant case. The arbitrary exaction of the California Supreme Court of the entire cost of capital improvements from *private* customers alone when public entities, such as School District, enjoy the benefits of use cannot stand.

As the California trial and intermediate appellate courts clearly demonstrated, there is a fairly possible — indeed, much preferable — interpretation of state statutes which will avoid the constitutional violations.

The Petition for Certiorari should be granted and the Judgment of the California Supreme Court reversed.

Respectfully submitted,

GOEBEL, SHENSA & BEALE
By: Louis E. Goebel

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APPENDIX A

COPY

SUPREME COURT
FILED
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DEPUTY

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SAN MARCOS WATER DISTRICT,
Plaintiff and Respondent,

v.

SAN MARCOS UNIFIED SCHOOL DISTRICT,
Defendant and Appellant.

L.A. 32134
(Ct. of Appeal No. 4/1 D001951
Super. Ct. No. N24145)

I. INTRODUCTION

Are utility fees for capital funding "special assessments" from which public entities are exempt, or "user fees" which public entities must pay? This case presents the question whether the San Marcos Unified School District (school district) is obligated to pay "sewer capacity right fees" (capacity fees) imposed by the San Marcos Water District (water district). The capacity fees are used by the water district to fund capital improvements. The school district argues that the capacity fee is a special assessment, and that school districts and other public entities are impliedly

exempt from paying special assessments unless the Legislature directs otherwise. The water district argues that the capacity fee is not a special assessment, but is a user charge which all utility users must pay. In the alternative, the water district argues that even if we hold that the capacity fee is a special assessment, it is legislatively authorized by either the Education Code or the Water Code. Finally, the water district maintains that the school district should be required by its water use contract or by the doctrine of promissory estoppel to pay the capacity fees imposed for the use of the sewer system.

We conclude that the trial court erred in finding that the school district is required to pay the sewer capacity fee. We believe that the capacity fee is an assessment which has not been authorized by the Legislature, and that the school district is not required by either contract or promissory estoppel to pay the capacity fee. Our conclusion does not mean that the water district cannot collect money for capital improvements from its customers; it simply means that the *private* customers will pay the entire cost of capital improvements. Public entities, such as the school district, will not be required to allocate their limited tax revenues to pay for capital improvements built by the sewer district.

II. THE FACTS

This case was submitted to the trial court on November 15, 1983, as an "agreed case" as provided for in Code of Civil Procedure section 1138. Thus, the parties filed an agreed statement of facts and sought adjudication of their obligations concerning any payment of future fees or return of fees already paid. The facts which follow are derived from the agreed statement.

Both the water district and the school district are located in the San Marcos area of San Diego County. The territory of the school district is larger than that of the water district, but all currently used school sites are within the water district's sewer service area.

In 1971, the school district connected its facilities to the water district's sewer system. From 1971 to 1981, the school district paid three type of fees to the water district: connection fees, monthly service fees, and capacity fees. The water district imposed these fees pursuant to Health and Safety Code section 5471.[1] The connection fee is charged when the property is connected to the sewer system in order to pay for labor and materials involved in making the new connection. The monthly service fee is based on the approximate amount of sewage discharged and is computed according to the number of students, faculty, and staff members assigned to the school. The capacity fee is a one-time fee for capital improvements paid at the time of connection; the capacity fee is based on *anticipated* sewage discharge. (The capacity fee charged is $2,400 for each 25 students and staff members assigned to the school.) If the population of a school increases, the water district on an annual basis can charge an additional capacity fee. The capacity fee is "a primary source of funds for the development of additional capacity and [is set] at a level which will defray the costs of providing additional sewage

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[1] This section provides in pertinent part: "Any entity shall have power, by an ordinance approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect fees, tolls, rates, rentals, or other charges, including sewer standby or immediate availability charges, for services and facilities furnished by it, either within or without its territorial limits, in connection with its sanitation or sewerage system; . . . ."

treatment and/or reclamation facilities; major trunk and transmission pipelines and facilities for pumping when such facilities are needed." (San Marcos Water District Ord. No. 47-6, art. X, § 4.)

Although the school district paid $59,750[2] in capacity fees from 1971 to 1980, beginning in 1981 the school district refused to pay the capacity fees, claiming to be exempt from such assessments. Litigation ensued and the trial court entered judgment on March 14, 1984, ruling that "the Education Code, particularly section 39613," provides the authority for imposing capacity fees upon the school district. In addition, the court found that Water Code section 31101.5, effective January 1, 1983, also provides authority for the water district to impose the capacity fees. Because the trial court based its ruling on the statutory authority for the capacity fee, the court impliedly found that the capacity fee is a special assessment requiring such authorization. The trial court ruled that the school district must pay to the water district "all amounts owing as capacity fees billed but unpaid together with interest at 7% per annum up to the time of Judgment and 10% per annum on said amount thereafter until paid."

III. THE COURT OF APPEAL OPINION

Because this case came to us on a petition for review, we will review the Court of Appeal opinion. The Court of Appeal upheld the judgment, but its reasoning was different than that of the trial court. The appellate court did not

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[2] Amicus Los Angeles Unified School District (LAUSD) notes that, with its population of over 690,000 students and employees, LAUSD would have to pay $66.24 million ($2,400 per 25 students and staff members) if it were charged an identical capacity fee.

reach the question whether there is legislative authority in the Education Code or the Water Code for the water district's capacity fee. The Court of Appeal found that no such authority was needed, because the capacity fee is not a special assessment, but rather a *user charge*, and as such the school district must pay the fee.

The court declined to follow three California appellate decisions which had held that a local public utility which operates a sewer system cannot collect a fee, designed to defray the costs of future capital improvements, from public entities not subject to the property tax. (See County of Riverside v. Idyllwild County Water Dist. (*Riverside*) (1978) 84 Cal.App.3d 655; Regents of University of California v. City of Los Angeles (*Regents I*) (1979) 100 Cal.App.3d 547; hg. den.; Regents of University of California v. City of Los Angeles (*Regents II*) (1983) 148 Cal.App.3d 451, hg. den.) Instead, the Court of Appeal examined the differences between "assessments" and "user charges," and the manner in which several out-of-state cases treated similar situations. The court found that the weight of authority in the out-of-state cases was that a fee for capital improvements to a sewer system is a user fee, not an assessment. The court noted that Associated Home-builders v. City of Livermore (1961) 56 Cal.App.2d 847, held that a sewer charge for capital improvements imposed pursuant to Health and Safety Code section 5471 "does not constitute an assessment on the value of property . . . but rather is in the nature of an excise tax . . . ." (*Id.* at p. 853.)

The Court of Appeal concluded that "The capacity fee does not constitute a special assessment for the purpose of the implied exemption [from paying such assessments] because it is not assessed against all property benefited by the sewer system but is only imposed on users of the system

whose use gives rise to the need for additional sewer capacity." Because the school district is not exempt from paying "user fees," the Court of Appeal held that it must pay the capacity fees at issue here.

In a dissenting opinion, Acting Presiding Justice Staniforth asserted that the majority should have followed the three California appellate decisions previously cited. He believed that, based on California law, the capacity fee is a special assessment which has not been positively authorized by the Legislature in either the Education Code or the Water Code. He also rejected the water district's argument that the school district is bound by contract or promissory estoppel to pay the capacity fees. Because a public entity which is exempt from property taxes is also impliedly exempt from "special assessments" not expressly authorized by the Legislature, the dissent found that the school district should not have to pay the capacity fees.

IV. DISCUSSION

A. Special Assessment or User Charge?

Article XIII, section 3, subdivision (b), of the California Constitution provides that property owned by public entities such as the school district is exempt from property taxation. Courts have held that such property is likewise impliedly exempt from "special assessments." "While publicly owned and used property is not exempt from special assessments under the constitution or statutory law of this state, there is an implied exemption of such property from burdens of that nature . . . . The principle which makes property of the state . . . nontaxable . . . also precludes the imposition of a special assessment for a street or other local improvement upon such property, unless there is a positive legislative

authority therefor. [Citations.]" (Inglewood v. County of Los Angeles (1929) 207 Cal. 697, 703-704).

The rationale behind a public entity's exemption from property taxes and special assessments is to prevent one tax-supported entity from siphoning tax money from another such entity; the end result of such a process could be unnecessary administrative costs and no actual gain in tax revenues. (Eisley v. Mohan (1948) 31 Cal.2d 637, 642.) On the other hand, when one tax-supported entity provides goods or services to another, neither the California Constitution nor decisional law exempts the public entity from paying for these goods or services.

Although both parties agree that the school district is exempt from special assessments unless there is contrary legislative authority, the parties disagree as to whether the challenged capacity fee is a special assessment. The water district and its amici argue that the capacity fee does not have the characteristics of an assessment, but rather those of a usage fee. For example, the amount of the capacity fee is based on anticipated usage, not the value of the benefit to the property. The capacity payment is "voluntary" — in the sense that it is the payor's solicitation and utilization of the sewage service which triggers the charge As such, the capacity fee must be paid by the school district as well as by all other users of the sewer system. The school district and its amici urge the court to reach the same conclusion as did the courts in *Riverside, Regents I, and Regents II*: a fee used to provide funds for capital improvements to sewer facilities, rather than simply to cover ongoing costs of service, is a special assessment, even if the amount of the fee is based on actual or anticipated usage.

What is a special assessment? "A special assessment is not in the constitutional sense a tax at all. It is a compulsory

charge placed by the state upon real property within a predetermined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein . . . ." (Spring Street Co. v. City of Los Angeles (1916) 170 Cal.24, 29.) The court in Solvang Municipal Improvement District v. Board of Supervisors (1980) 112 Cal.App.3d 545, discussed the difference between a property tax and a special assessment: "An ad valorem tax on real property describes a general tax levy which applies a given rate to the assessed valuation of all taxable property within a particular taxing district. Such is the tax levied by a county to pay for general expenditures, such as fire and police protection, and for general improvements, such as fire stations, police stations, and public buildings, which are deemed to benefit all property owners within the taxing district, whether or not they make use of or enjoy any direct benefit from such expenditures or improvements . . . . In contrast, a special assessment, sometimes described as a local assessment, is a charge imposed upon particular real property for a local public improvement of direct benefit to that property, as for example, a street improvement, lighting improvement, irrigation improvement, sewerage connection, drainage improvement, or flood control improvement . . . . This view makes a clear distinction between taxes which are levied for general revenue and for general public improvement; and special assessments, which are levied for local improvements which directly benefit specific real property." (*Id.* at pp. 552-553.)

The Court of Appeal in the instant case described the average special street assessment as a *typical* special assessment. The assessment is a one-time charge. "The cost of paving a street is assessed against all abutting property owners in proportion to the amount of property fronting on

the street. The assessment is involuntary (a property owner cannot refuse to have the street in front of his house paved) and unrelated to actual use of the paved street (a similarly situated property owner with no vehicles is assessed by the same as one with several)."

In contrast to a special assessment, a usage fee typically is charged only to those who use the goods or services. The amount of the charge is related to the actual goods or services provided to the payer. The usage fee for an ongoing service would normally be a monthly charge rather than a one-time charge.

In its opinion, the Court of Appeal pointed out that Health and Safety Code section-5471, enacted in 1945, authorizes the collection of "fees, tolls, rates, rentals, or other charges" for services *and* facilities furnished by the water district. The court found it significant that the Legislature did not include the word "assessments" in the list, and concluded that the Legislature understood that a user charge does not become a special assessment merely because it is used for capital improvements.

We do not find the absence of the word "assessments" to be convincing evidence that the Legislature would not consider fees for capital improvements to be special assessments. Amicus University of California, supporting the school district, points out that the state and its agencies are not bound by general words used in a statute (Inglewood v. County of Los Angeles, supra, 207 Cal. 697, 707) unless compliance with that statute would result in no impairment of sovereign powers. (Hoyt v. Board of Civil Service Commrs. (1942) 21 Cal.2d 399, 402.) In this case, according to amicus, such an impairment could occur, because the charges necessary to fund local capital improvements to the sewer district would reduce the

resources which the school district may use to perform its other functions. (County of Santa Barbara v. City of Santa Barbara (1976) 59 Cal.App.3d 364, 369).

The Court of Appeal concluded that the capacity fee in the instant case is a *hybrid*: "The capacity fee thus has some characteristics which resemble a special assessment (one time charge; not based on actual use) and some which look more like a user charge (charge only applies to users; based on anticipated use)." We agree that the capacity fee is a hybrid, but we conclude we should follow the three prior appellate opinions which held that a similar fee is a special assessment. These opinions established a rule which looks to the *purpose* of the fee being charged, and not simply to *form* of the fee, a matter which can be easily manipulated.

In *Riverside*, a water district attempted to collect a "capital cost sewer capacity charge" from all tax-exempt entities. The county refused to pay, contending the charge was invalid. The *Riverside* court held that "unless the Legislature expressly so authorizes, property publicly owned and used is exempt from special assessments. [Citations.] The imposition of a capital cost charge on tax exempt entities was a means of making such entities contribute a proportionate share of the cost of constructing the district's sewerage facilities. *The charges are in effect a special assessment under a different name* and constitute an attempt by the district to do indirectly that which it could not do directly. [Citations.]" (Italics added, *Riverside*, supra 84 Cal.App.3d 655, 659-660.)

In *Regents I*, the Regents of the University of California challenged a "sewage facilities charge" imposed by the City of Los Angeles on all *users* of the city sewer system. (The Regents did not dispute a connection charge and a monthly service charge which were also imposed.) The court stated

that "although the amount of the 'sewage facilities charge' is based upon anticipated use of the sewer system by the user, the collected revenues are not used to defray the costs of providing sewer service to the users. Such costs are funded through the 'sewer connection charge' and the 'monthly sewer service charge,' charges whose payment the Regents do not dispute. Rather, the revenues collected as a result of the 'sewage facilities charge' are used by the city to provide capital for sewer construction, i.e., to finance local improvements. *Such a charge for capital funding is little more than a disguised special assessment.* [Citation.]" (Italics added, *Regents I*, supra, 100 Cal.App.3d 547, 549-550.) The court concluded that, although it might be more fair if the Regents were required to pay their share of the capital costs of local improvements whose benefits they enjoy, the court had no authority to modify the tax-exempt status of the university.

Following *Regents I*, the City of Los Angeles amended its municipal code to increase its sewer service charge. The new charge included a portion for capital funding and was based on *actual* rather than *anticipated* use. The Regents nonetheless refused to pay the portion of the service charge that was earmarked for capital improvements. The Court of Appeal in *Regents II*, supra, 148 Cal.App.3d 451, rejected the city's argument that this new charge differed from the one in *Regents I* because it was based on actual use. The court held that "The *Regents* test is the *purpose* of the disputed charge. [Citation.] Nor does the method of calculating a charge define its nature. Whether the charge is a one time occurrence or a monthly assessment is irrelevant to the purpose for which the collection is made. The character of the assessment is also not affected by the fact that the sewer service charge is unrelated to property value. [Citation.]" (*Id.* at p. 456.)

The Court of Appeal in the instant case found that the capacity fee at issue is a user charge because it was charged only to *users* of the sewer system rather than being assessed to all property owners in the district. Although the courts in *Riverside, Regents I, and Regents II* did not analyze this factor, we suggest that charging users rather than property owners is a factor as easily manipulated as is the method of computing the fee.

In *Regents I and Regents II*, the capital improvements charge was assessed only to users of the sewer system, yet the courts found the charge to be an assessment. By placing the emphasis on the *purpose* of the charge, the courts in those cases created a rule which both conforms to the policy behind the implied exemption for public entities, and avoids easy manipulation. A contrary ruling would, in effect, abrogate the public entities' implied exemption from assessments by sewer districts. Under the rule we adopt, no matter how the *form* of the fee is varied (i.e., whether based on actual or anticipated use, or unrelated to use; whether a one-time fee or monthly fee; and whether charged to all property owners or only to users of the sewer system), the *purpose* of the fee will determine whether or not public entities are exempt from paying the fee. In sum, a fee aimed at assisting a utility district to defray costs of capital improvements will be deemed a special assessment from which other public entities are exempt.

Amicus University of California points out that the 5,244 special districts in California are responsible for most of the basic infrastructure systems which are vital to our economy. Costs for these special districts often exceed revenues and the districts frequently need more money. Rather than allowing these essentially local special districts to determine that public entities should contribute to their capital

improvements, however, we believe that the Legislature should evaluate statewide needs and allocate funds accordingly. Thus, a state agency is responsible for paying a special assessment such as the instant capacity fee only when the Legislature authorizes such payment.

B. Legislative Authority for the Capacity Fee

The water district and its amici argue that even if we find that the capacity fee is a special assessment from which public entities ordinarily would be impliedly exempt, there is legislative authority, in either the Education Code or the Water Code, for requiring the school district to pay the challenged assessment. We will examine these codes separately.

1. The Education Code

Education Code section 39613[3] permits a school district to construct its own sewer system or acquire "rights" in sewer systems constructed by others. The water district contends that this section provides express legislative authorization for its capacity fee. We disagree.

The water district's argument is that because the section permits the school district to build its own sewer system or acquire rights in another system, and to pay for such projects with money from the district's building fund

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[3] This section provides: "In addition to the other powers granted the governing board of each school district may provide sewers and drains adequate to treat and/or dispose of sewage and drainage on or away from each school property. For this purpose it may construct adequate systems or acquire adequate disposal rights in systems constructed or to be constructed by others for these purposes without regard to their proximity. The cost thereof may be paid from the building fund, including any bond moneys therein."

(which is used for funding capital improvements), therefore this section implicitly authorizes the school district to pay an *assessment* imposed on it by the water district. But if the Legislature intended school districts to be subject to special assessments for sewer systems, it undoubtedly would have said so directly. For example, Education Code Section 39609[4] *expressly* authorized school districts to "appropriate money to pay assessments, for the improvement of streets or other public places." By contrast, Education Code section 39613 contains no reference whatsoever to assessments.

The predecessor of Education Code section 39613 was enacted as an urgency measure in 1950 to allow school districts to use building funds to construct sewer systems either alone or in conjunction with others, without regard to the proximity of the systems. According to section 39613, a school district can build its own sewer system or acquire ownership rights in a system built with others. In addition, Education Code section 39011[5] authorizes or requires a

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[4] This section provides: "The governing board of any school district may appropriate money to pay assessments, for the improvement of streets or other public places, levied against any real property owned by, or under the control of the board, when the property is included within an assessment district formed in pursuance of any general law of the state or under the charter of any municipality. The assessments may be paid out of any funds belonging to the school district, except funds derived from the sale of bonds or required by law to be used for teachers' salaries."

[5] This section provides in pertinent part: "Where a city, district, or other political corporation or subdivision of the state is authorized by law to furnish sewerage, water or other utility facilities to a school district and is not required to provide for the installation thereof to such school district at its own expense, it may enter into an agreement with such school district whereby the cost of installation will be paid by the

school district to pay for the installation costs when contracting with a water district for sewer service. Neither statute authorizes or requires a school district to appropriate money to pay special assessments. As we have previously explained, a special assessment may not be imposed on property belonging to a public agency absent *express* legislative authorization. (*Riverside*, supra, 84 Cal.App.3d at pp. 659-660.)

2. The Water Code

The water district next argues that section 31101.5 of the Water Code, which became effective in 1983, authorizes the water district to levy a special assessment for capital improvements upon the school district. Section 31101.5 states: "A district may supply sewage and waste services to property not subject to district taxes at special rates, terms, and conditions as are determined by the board for the services." But this section uses the word "services"; it does not mention *assessments* and it does not mention *fees for capital improvements*. It simply allows water districts to set rates for public agencies that are different than the rates for private customers.

Other sections of the Water Code cited by the water district likewise provide no authority for assessing property owned by public agencies. Section 31100 gives water districts the right to contract with public agencies. Section 31101 permits water districts to charge for services and facilities. None of these sections provides the express

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school district under such terms as the parties may agree to, with reimbursement from charges made or to be made to other users of such facilities as may be agreed upon between the parties, same insofar as other provisions of law control the terms of such reimbursement."

authority that is required for imposing a special assessment on a public entity.

C. Payment Not Required by Contract or Promissory Estoppel

Finally, the water district points out that the school district had a choice of constructing its own sewer system or contracting with another agency to provide the service. Because the school district has voluntarily elected to connect its schools to the water district's system, the school district should be required by contract to pay all fees, including the capacity fee. It is uncontested, of course, that the school district is required to pay the water district connection fee and the monthly service fee. But because we believe the capacity fee is a special assessment, it is not a fee that the school district can agree by contract to pay. According to *Riverside*, supra, 84 Cal.App.3d at page 659, "whether the [school district] can agree to pay the charge depends on whether the [water] district has the power to impose it." Because the water district does not have the power to impose the capacity fee here, if the school district pays the invalid charge it would amount to a "gift of public funds in contravention of article XVI, section 6 of the California Constitution." (*Id.* p. 660.)

The water district alternatively urges us to hold that the doctrine of promissory estoppel applies to require the school district to pay the capacity fee. Here, the school district (1) promised to pay the capacity fee upon first being allowed to connect to the water district's sewer system, and (2) furthermore paid the capacity fees for 10 years before claiming an exemption. The water district contends that the school district is accordingly estopped from denying the obligation to pay capacity fee.

In City of Long Beach v. Mansell (1975) 3 Cal.3d 462, we stated that it is a "well-established proposition that an estoppel will not be applied against the government if to do so would nullify 'a strong rule of policy, adopted for the benefit of the public, ...' [Citation.]" (*Id.* at p. 493.) Public entities are exempt from property taxes and special assessments in order to preserve the balance in funding established by the Legislature and to avoid unnecessary administrative costs. (See Eisley v. Mohan, supra, 31 Cal.2d 637, 642.) Because we believe that the implied exemption against special assessments on property owned by public agencies is indeed a "strong" public policy, the doctrine of promissory estoppel is not applicable to this case.

D. The "Special Tax" Issue

The school district had argued that even if the capacity fee is not deemed a special assessment, the fee is not reasonably related to the cost of the service for which it is imposed within the meaning of Government Code section 50076.[6] Therefore, according to the school district, the capacity fee is a "special tax" which would require a two-thirds voter approval to be valid under article XIIIA, section 4 of the California Constitution.

The school district raised this argument for the first time on appeal and the water district had no opportunity to make a record on this issue. Although we do not find it necessary to reach it because we hold the capacity fee is a special assessment, we agree with the Court of Appeal's statement

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[6] "As used in this article, 'special tax' shall not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes."

that the issue was untimely raised. Because the issue of reasonable relationship is largely factual (see Beaumont Investors v. Beaumont Cherry Valley Water Dist. (1985) 165 Cal.App.3d 227, 234-235), the appellate court's refusal to examine this issue was correct.

V. CONCLUSION

Because the capacity fee is a special assessment which has not been authorized by the Legislature, we hold that the school district is not required to pay the fee. The judgment of the Court of Appeal is reversed. As for capacity fees that were paid by the school district from 1971 to 1980, this matter is remanded to the Court of Appeal for further proceedings to determine whether those fees must be refunded.

LUCAS, J.

WE CONCUR:

MOSK, J.
BROUSSARD, J.
REYNOSO, J.
PANELLI, J.

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SAN MARCOS WATER DIST. v. SAN MARCOS UNIFIED SCHOOL DIST. L.A. 32134

CONCURRING OPINION BY GRODIN, J.

It is not entirely clear to me — nor was it to the Court of Appeal — why a fee which is based upon an estimate of prospective use is a "special assessment" rather than a "user fee" because its purpose is to fund capital improvement. I agree with the majority, however, that we should defer to the now well-established precedent to that effect and invite the Legislature, if it sees fit, to establish a different rule. On that basis, I concur.

GRODIN, J.

I CONCUR:
BIRD, CJ.

APPENDIX B

CERTIFIED FOR PUBLICATION

FILED
Keenan G. Casady, Clerk
AUG 19 1985
COURT OF APPEAL
FOURTH DISTRICT

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

SAN MARCOS WATER DISTRICT,
Plaintiff and Respondent, D001951
(Super. Ct. No. N24145)

v.

SAN MARCOS UNIFIED SCHOOL DISTRICT,
Defendant and Appellant.

APPEAL from a judgment of the Superior Court of San Diego County, F. V. Lopardo, Judge. Affirmed.

Vernon A. Peltzer, Jeffrey G. Scott and Smith & Peltzer for Plaintiff and Respondent.

Lynn R. McDougal and McDougal, Meloche, Love & Eckis for Defendant and Appellant.

Defendant San Marcos Unified School District (School District) appeals from a judgment entered on an agreed case pursuant to Code of Civil Procedure sections 1138 and 1139 validating a "sewer capacity right fee" (capacity fee) imposed on the School District by plaintiff San Marcos Water District (Water District.) We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The case was submitted to the trial court on a stipulated set of facts. The Water District provides sewer services and the School District provides educational services for the San Marcos area. Although the boundaries of the two districts are not contiguous, they serve roughly the same community. All of the currently used school sites of the School District are within the Water District.

Beginning in 1971, the School District connected certain of its school sites and facilities to the Water District's sewer system and thereby began incurring various charges from the Water District. The Water District charges its customers three different types of fees. A *connection fee* is charged when a customer's property is initially connected to District sewer lines. (See *post*, p. 10 and fn. 8.) A *monthly sewer service charge* is assessed based on rates approximating the amount of sewage discharged monthly.[1] And a one-time *capacity fee* is also charged prior to connection which, like the monthly service charge, is based on approximate amounts of sewage discharged.[2] According to a 1983 Water District ordinance, the capacity fee "is a primary source of funds for the development of additional capacity and [is set] at a level which will defray the costs of providing additional sewage treatment and/or reclamation facilities, major trunk and transmission pipelines and facilities for pumping when such facilities are needed."

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[1] For schools, the monthly service charge amounts of $5.75 for the first 25 students, faculty, staff, etc., at the facility and $3.50 for each additional 25 persons assigned to the school.

[2] For schools, the capacity fee charged is equal to $2,400.00 for each 25 students, faculty, staff, etc. assigned to the school.

DISCUSSION

The sole question presented to the trial court and to us on appeal is whether the Water District may validly collect the capacity fee from a property tax-exempt entity such as the School District. There is no dispute as to the Water District's authority to collect or the School District's obligation to pay the connection fees and monthly service charges. Nor is there any contention by the School District that the capacity fee it is charged is any different from the capacity fees charged non-tax-exempt entities. Because the facts a e undisputed, we review the trial court action as involving solely a question of law.

I

The Water District's capacity fee is imposed pursuant to Health and Safety Code section 5471. That section provides in relevant part as follows:

> "An entity shall have power . . . to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges, including sewer standby or immediate availability charges, for services and facilities furnished by it, either within or without its territorial limits, in connection with its sanitation or sewerage. . . . Revenues derived under the provisions in this section, shall be used only for the acquisition, construction, reconstruction, maintenance and operation of water systems and sanitation or sewerage facilities . . .; provided, however, that such revenue shall not be used for the acquisition or construction of new local sewers or laterals as distinguished from main trunk, interceptor and outfall sewers."

The School District relies on a series of three cases which, with minor factual variations, address the question whether a local government entity which operates a sewer system can collect a fee designed to defray the costs of capital improvements from public entities not subject to the property tax. (See *County of Riverside* v. *Idyllwild County Water Dist.* (1978) 84 Cal.App.3d 655; *Regents of University of California* v. *City of Los Angeles* (1979) 100 Cal.App.3d 547; *Regents of University of California* v. *City of Los Angeles* (1983) 148 Cal.App.3d 451.) In each case, the court concluded that to the extent the fee was used to finance capital improvements, it constituted a special assessment which could not be collected from tax-exempt entities absent legislative authorization.[3]

The Water District responds with a sequential argument. It first contends the capacity fee is not a special assessment but rather a service charge or user fee. Accordingly, in the District's view, the fact that the School District is exempt from the property tax is irrelevant. Even if the capacity fee is a special assessment, however, the Water District finds legislative authorization for the assessment in Education Code section 39613 which empowers school districts to construct their own sewer systems or to contract for the right to utilize sewer systems constructed by others.[4] The

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[3] Under established law, public agencies in California are generally exempt from property taxation under the provisions of article XIII, section 3 of the California Constitution. (*Inglewood v. County of Los Angeles* (1929) 207 Cal. 697, 702.) Although the constitutional exemption does not apply to special assessments, the courts have considered public property impliedly exempt from special assessments unless the Legislature provides otherwise. (*Id.*, at pp. 703-704.)

[4] Education Code section 39613 provides:

"In addition to the other powers granted the governing

District suggests that since the construction of a sewer system by a school district would clearly involve capital costs, the Legislature must have intended that a school district's "contracts" for sewer utilization rights include payment of capital costs. Finally, the Water District argues that capacity fees for tax-exempt entities were specifically authorized with the enactment of Water Code section 31101.5 in 1982.[5] (Cf. Water Code, 71670-.5; *Carlton Santee Corp.* v. *Padre Dam Mun. Water Dist.* (1981) 120 Cal.App.3d 14, 30.)

II

The first question we must address is whether the Water District's capacity fee constitutes a "special assessment." If it does, the School District cannot be required to pay it absent special legislative authorization. On the other hand, if the capacity fee is merely a user service charge, i.e., the price charged for a governmental service, there is no reason to exempt the School District from a fee all users of the sewer system must pay.

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board of each school district may provide sewers and drains adequate to treat and/or dispose of sewage and drainage on or away from each school property. For this purpose it may construct adequate systems or acquire adequate disposal rights in systems constructed or to be constructed by others for these purposes without regard to their proximity. The cost thereof may be paid from the building fund, including any bond moneys therein."

[5] Water Code section 31101.5, effective January 1, 1983, provides:

"A district may supply sewage and waste services to property not subject to district taxes at special rates, terms, and conditions as are determined by the board for the services."

County of Riverside v. *Idyllwild County Water Dist.*, *supra*, 84 Cal.App.3d 655 was the first case to confront a similar question. The water district sought to impose a monthly sewer capacity charge against tax-exempt public entities as an " 'equitable contribution toward the capital cost of the sewerage system.' " (*Id*, at p. 657.) The court began by stating the general rule that tax-exempt public entities are also impliedly exempt from special assessments. (*Id.*, at pp. 659-660.) It then framed its conclusion in the following terms:

> "The imposition of a capital cost charge on tax exempt entities was a means of making such entities contribute a proportionate share of the cost of constructing the district's sewerage facilities. The charges are in effect a special assessment under a different name and constitute an attempt by the district to do indirectly that which it could not do directly."[6] (*Id.*, at p. 660.)

The court then goes on to support is holding by citing an Attorney General's Opinion (19 Ops. Cal. Atty.Gen. 195) which states that charges and fees for sewer services may be assessed against public entities to the extent the same charges and fees are paid by all other sewer users. Noting that the water district's capacity charge was assessed only against tax-exempt entities, the court concluded the charge was invalid. (84 Cal.App.3d at p. 660.)

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[6] The *Riverside* court cited *County of Santa Barbara* v. *City of Santa Barbara* (1976) 59 Cal.App.3d 364, 376 in support of its holding. While the *Santa Barbara* case does indicate that a public entity cannot label as a "charge" that which is really a special assessment, there is no discussion of how to distinguish the two concepts.

A fact situation virtually identical to the present case was considered by the court in *Regents of University of California* v. *City of Los Angeles, supra,* 100 Cal.App.3d 547 (*Regents I.*) The City of Los Angeles operated a sewer system and imposed a one-time "sewer facilities charge" before a property improvement could be connected for sewer service. The charge was scaled to anticipated use by each user and was used to defray the costs of sewer construction. As in the present case, the charge was imposed on all sewer system users, not just tax-exempt entities. Relying almost exclusively on the *Riverside* opinion, the court ignored the portion of that case which discussed the selective impact of the capacity fee on tax-exempt public entities and focused solely on the evaluation of the fee as a special assessment. Defining a special assessment as "a charge imposed on property owners within a limited area to help pay the cost of a local improvement designed to enhance the value of the property within that area" (*id.*, at p. 549), *Regents I* court syllogistically concluded:

> "[T]he revenues collected as a result of the 'sewage facilities charge' are used by the city of provide capital for sewer construction, i.e. to finance local improvements. Such a charge for capital funding is little more than a disguised special assessment." (*Ibid.*)

The same parties again squared off in *Regents of University of California* v. *City of Los Angeles, supra,* 148 Cal.App.3d 451 (*Regents II.*) Los Angeles responded to the *Regents I* decision by increasing its monthly sewer service charge so that monies from such charge could be used to finance capital improvements. The *Regents II* court responded by striking down the increased charge, holding

that the critical issue in determining whether the charge was a special assessment "is the *purpose* of the disputed charge." (*Id.*, at p. 455, emphasis in original.) The court read the *Regents I* decision to hold that where the purpose of the charge is to finance capital improvements rather than operating expenses, it constitutes a special assessment which, as a general rule, cannot be imposed against tax-exempt public entities. (*Ibid.*)

III

It would be a simple matter for us to cite *Riverside* and the two *Regents* decisions for the "purpose of the charge" proposition in rejecting the Water District's contention. Unfortunately, the easy way is not always the correct one. We are concerned that a statement unnecessary to the holding in *Riverside* has been developed by the *Regents* cases into a full-blown proposition of law without sufficient — indeed without any — analysis of the economic implications of the proposition on local government finance.

It is perhaps helpful to begin by analyzing the economic rationale behind the Water District's capacity fee. We will then proceed to examine the economic factors which distinguish user charges from special assessments and, more generally, from taxes.

A

It is obvious that the Water District has sought to finance its sewer system largely by payments from users of that system rather than from general tax revenues. Accordingly, each sewer user pays a connection fee to compensate for the labor and materials involved in connecting a property

improvement to the sewer system. In addition, a monthly service charge is imposed to cover the operating expenses associated with treating the amount of sewage discharged by the user during the month. Both of these charges, however, assume the existence of an operating sewage system including main sewer lines, a treatment plant and a sewage outfall for discharge of the treated sewage into the ocean. The Water District has sought to recoup the costs of constructing such major facilities by way of the challenged capacity fee. The capacity fee assumes that a system with x capacity is needed to effectively treat a monthly sewage discharge of x. If a new building is connected to the sewer system which increase the monthly sewage discharge to $x + y$, the capacity of the system must correspondingly be increased by y. By setting its capacity fee at a level equal to the cost of adding y capacity, the Water District is simply charging to each new sewer use the capacity costs associated with its impact on the system.

B

In economic terms, user charges are merely one source of revenue for local governments. For our purposes we can divide self-generated revenues into three general categories: taxes, special assessments and user fees. There is a great deal of legal literature attempting to distinguish between taxes and special assessments, but very little which analyzes the concept of a user charge. (E.g., *State Highway Commission* v. *City of Topeka* (Kan. 1964) 393 P.2d 1008, 1010; see also 14 McQuillin, Municipal Corporations (1970 rev.) § 38.01 and cases there cited.) In contrast, economists writing on the topic of public finance spend a great deal of time discussing taxes and user charges but routinely omit extensive references to special assessments. (See, e.g.,

Hirsch, The Economics of State and Local Government (1970); Kamer, Crisis in Urban Public Finance (1983).) This is because, to the economist, there is a great deal of difference between taxes and user charges but significantly less difference between special assessments and user charges. User charges for public services are viewed as analogous to the prices charged by private business entities for commercial services. The amount of the charge is closely tied to the benefits received by the purchaser. (See, e.g., Hirsch, *op. cit. supra*, at p. 31.) Special assessments, though distinguishable from user charges, are functionally quite similar because the amount of the assessment, at least in theory, is tied to the benefits received by the owner of the assessed property. (E.g., Bird & Slack, *Urban Finance and User Charges*, in State and Local Finance (Break edit. 1983), p. 216; 4 Sands & Libonati, Local Government Law (1982) § 24.06, pp. 24-17.) Taxes on the other hand, are quite different from both user charges and special assessments because their amount is generally determined not by reference to benefits received but rather on some measure of the taxpayer's ability to pay. (Due and Friedlaender, Government Finance — Economics of the Public Sector (1973) pp. 236-237; Hirsch, *op. cit. supra*, at pp. 50-51.)

Economists have for some time advocated more extensive utilization of user charges by local governments to finance certain public services. (E.g., Bird & Slack, *op. cit. supra*, at p. 251.)

> "User charges put public prices on public products. They apply to those who voluntarily consume public services or use public facilities. . . . They are favored by economists not only because they raise additional revenues, but

> also because they can lead to a more efficient allocation of resources and a more equitable distribution of public services. Efficiency is served because user charges provide a price signal as to what goods should be produced and at what levels. Equity is served because only those who benefit from a service actually pay for it." (Kamer, *op. cit. supra*, at p. 64.)

As noted above, economists tend to view special assessments as analogous to user charges because the amount of the assessment varies with the benefits received. Special assessments, however, are not true "public prices." One set of economists has sought to define special assessments and distinguish user charges:

> "Special assessments and related devices such as subdivision exactments or lot levies are compulsory payments (in cash or kind) intended to defray the cost of certain public sector capital outlays. They are not 'user charges' as normally defined, because the amount charged is not related to the use made of any good or service provided by governments." (Bird & Slack, *op. cit. supra*, at p. 216.)

Thus defined, special assessments are properly viewed as a one-time benefit tax which, like taxes based on the ability-to-pay principle, are distinguished from user charges by their involuntariness and the fact that the amount of the assessment is unrelated to use of the public service.[7]

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[7] The average special street assessment is a typical example. The cost of paving a street is assessed against all abutting property owners in proportion to the amount of property fronting on the street. The assessment is involuntary (a property owner cannot refuse to have the

Because they view user charges as a pricing system for public services, it seems clear economists would have no trouble concluding that the type of monthly fee struck down by the court in *Regents II, supra,* 148 Cal.App.3d 451 is in reality a true user charge rather than a special assessment. While it is true that special assessments are used to fund capital improvements, it does not follow that any charge used to fund capital improvements is necessarily a special assessment. By analogy to the private sector, businesses normally obtain capital to finance improvements from the prices they charge for their goods and services. If a dry cleaning business needs new equipment, there is no procedure for specially assessing its customers. The cost of the new equipment must be factored into the prices charged for cleaning clothes in the same way as Los Angeles factored the cost of sewer treatment improvements into the price charged for sewer service in *Regents II*. As one economist has stated in explaining the advantages of user charges:

> "User charges can reduce congestion by rationing scarce facilities to those who place the highest value on access to them. User charges can also provide the *capital* needed to maintain *or expand* existing public facilities. For example, a user charge imposed on motorists who travel on major highways during peak rush hours can reduce highway congestion while, at the same time, generating the capital needed for highway

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street in front of his house paved) and unrelated to actual use of the paved street (a similarly situated property owner with no vehicles is assessed the same amount as one with several.)

improvements." (Kamer, *op. cit. supra*, at p. 64, emphasis added.)

The major difference between the capacity fee in this case and in *Regents I* compared with the service charge in *Regents II* is that the capacity fee is a one-time charge based on anticipated use whereas the service charge is a monthly assessment based on actual use. The capacity fee thus has some characteristics which resemble a special assessment (one time charge; not based on actual use) and some which look more like a user charge (charge only applies to users; based on anticipated use). (Compare *Seal Tanning Co.* v. *City of Manchester* (N.H. 1978) 393 A.2d 1382, 1386 (A special assessment "is incurred only once and is collected from a landowner who is specially benefited by the sewer's construction whether or not he is actually connected to the sewer system.").) To resolve the question of which category this hybrid is most properly placed within, we must turn from the realm of public economics to that of legal precedent. Our examination will necessarily include an analysis of the rationale underlying the exemption from special assessments enjoyed by public entities to determine whether policy considerations warrant its extension to the capacity fee at issue in this case.

IV

Our research has disclosed several out-of-state cases in which courts have been asked to review sewer charges analogous to the Water District's capacity fee. The closest on point would appear to be *Murray City* v. *Board of Ed. of Murray City Sch. Dist.* (Utah 1964) 396 P.2d 628. Murray City issued revenue bonds for extensions and improvements to the city's water plant and sewer system. To pay off the bonds, the city imposed a sewer charge based

on anticipated use of the sewer system. (*Id.*, at p. 629.) As in California, public agencies in Utah are generally exempt from taxes and special assessments. The school district accordingly contended it was exempt from the sewer charge. Rejecting the school district's argument that the sewer charge was in reality a special assessment, the Utah Supreme Court sought to distinguish the two concepts:

> "An assessment . . . is levied under the taxing power and is imposed upon property within a limited area for an improvement to enhance all property within that area. [Citation.] On the other hand, the cost of a service is determined by the benefits conferred upon the occupants of the land rather than an increase in value to the land itself." (*Id.* at p. 630).

Murray City was relied on by that same court in *Home Builders Ass'n of Gr. Salt Lake* v. *Provo City* (Utah 1972) 503 P.2d 451, sustaining a $100-per-living-unit "connection fee"[8] designed to defray the costs of improvements and enlargements to the sewer system. Citing *Murray City*, the court noted that sewer charges and connection fees "are neither taxes nor assessments but payments for services furnished." (*Id.*, at p. 452.)

A similar conclusion with respect to a similar connection fee was reached by the Indiana Supreme Court in *Brandel*

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[8] The connection fee in *Home Builders* and some of the cases we later discuss would be distinguished from the connection fee charged by the Water District in this case. (See ante, p. 2.) The Water District's connection fee is designed solely to compensate for the labor and materials costs incurred in physically connecting a property improvement to the sewer system. The connection in *Home Builders* and the other cases is analogous to the Water District's capacity fee because it is designed to defray the cost of capital improvements to the sewer system.

v. *Civil City of Lawrenceburg* (Ind. 1967) 230 N.E.2d 778. In distinguishing benefit taxes such as special assessments from user charges (referred to in the opinion as "use taxes") the *Brandel* court explained:

> "The tax here involved, it should be noted, is not a benefit tax, but rather a use tax for the services of disposing of sewage from particular property. It is not a benefit tax for the reason that not all property in the area under the ordinance is required to pay the $200.00 fee. It is only such property as has sewage to be disposed of to which the tax is applicable." (*Id.*, at p. 780.)

In *City of Dunedin* v. *Contractors & Builders Assn'n*(Fla. App. 1975) 312 So.2d 763, the city imposed a $325 "impact fee" for connections to the city's sewer system to cover the costs of capital improvements to that system. The court quite succinctly defined the issue before it:

> "No one doubts that a municipality has the power to make reasonable charges for water and sewer services. The question is whether the cost of projected capital improvements can be considered in setting the charges." (*Id.*, at p. 766, fn. 4.)

In concluding that sewer service charges may properly include the cost of projected capital improvements, the court stated as follows:

> "The imposition of fees for the use of a municipal utility system is not an exercise of the taxing power nor is it the levy of a special assessment. [Citation.] In our view, connection fees such as those involved in this case do not constitute a tax but a charge which may be made for the use of the utility service . . . ." (*Id.*, at p. 766, fn. omitted.)

In *Opinion of Justices* (N.H. 1944) 39 A.2d 765, the New Hampshire Supreme Court was asked to consider whether the City of Concord could charge the State certain "sewer rents" based on " 'the metered consumption of water on the premises connected with the sewer system, the number and kind of plumbing fixtures connected with the sewer system, the number of persons served by the sewer system or upon any other equitable basis.' " (*Id.*, at p. 766.) The funds raised by such charges were to be used for, among other things, the construction and repair of the sewer system including treatment and disposal facilities. (*Ibid.*) Responding to the argument that the sewer rents constituted a special assessment for which the state was impliedly exempt, the court responded that "the difficulty with this contention, as here applied, lies in the fact that the price which the city charges for sewer service is in no sense a special assessment." (*Id.*, at p. 767.) In support of its conclusion, the court cited a major treatise in the field:

> " '. . . Another form of a charge which is in substance a contract is to be found where a municipality, under authority conferred by statute, imposes a charge upon property owners who connect their land with a sewer system constructed by the city, the owner being free to avoid liability by refraining from making such connection. Such charge may be a fixed sum for the privilege of making the connection, or it may be a charge based upon the amount of sewage discharged from the premises into the sewer. *Such a charge is not ordinarily regarded as a local assessment.*' Page & Jones, Taxation by Assessment, § 6." (*Ibid.* (emphasis added); to the same effect, see also *Louisville and Jefferson County*

Met. Sewer D. v. *Barker* (Ky. 1948) 212 S.W.2d 122).[9]

Opinion of Justices was cited with approval by the court in *Hayes* v. *City of Albany* (Ore.App. 1971) 490 P.2d 1018. The *Hayes* court validated a sewer connection charge which ranged from $255 for a single family dwelling to as much as $400,000 for a major industrial plant. Of particular interest is the fact that *Hayes* also relied on a California Supreme Court decision in support of its holding. In *Associated Homebuilders* v. *City of Livermore* (1961) 56 Cal.2d 847, the city imposed a $150-per-dwelling-unit sewer connection charge designed to defray the cost of capital improvements to the sewer system. Relying on Health and Safety Code section 5471 (*ante*, p. 4), the court sustained the charge against a challenge by builders and developers that imposition of the charge exceeded the city's taxing power:

> "In any given case the charge prescribed by the subject ordinances is measured by the use to which the property (and consequentially the city's sewer system) will be put, including the number and type of plumbing fixtures to be installed. Accordingly, *it does not constitute an assessment on the value of the property* . . . but rather is in the nature of an excise tax imposed on all persons thereafter applying for building permits for the privilege of connection to (and is reasonably commensurate with the burden to be imposed on)

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[9] Interestingly, both *Opinion of Justices* and *Barker* were heavily relied on in 19 Ops. Cal.Atty.Gen. 195, the same Attorney General's Opinion relied on by the court in *Riverside, supra*, 84 Cal.App.3d ad p. 660 to support its conclusion that public agencies could not be charged for sewer services at rates different from private persons. (See *ante*, p. 7.)

the facilities of defendant's sewer system." (*Id.*, at pp. 852-853 (emphasis added).).)

We are not totally sure what the Supreme Court meant by a charge "*in the nature of* an excise tax." We suspect the court had in mind the type of analysis it employed in *City of Glendale* v. *Trondsen* (1957) 48 Cal.2d 93, 102-103 where it validated a city's rubbish collection fee alternatively characterized as a "excise tax" and "service charge".[10] In any event, it seems clear the *Livermore* court did not view the sewer connection charge as a special assessment.[11]

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[10] Under California law, an "excise tax" is generally considered to be any charge imposed pursuant to the government's taxing power other than a property or poll tax. (*City of Glendale* v. *Trondsen, supra,* 48 Cal.2d at pp. 103-104; accord 16 McQuillin, Municipal Corporations (3d ed. 1984) § 44.190, 0. 619.) Thus, even if sewer capacity and connection fees are characterized as excise taxes, the School District would be hard-pressed to argue it is exempt from such taxes based on the constitutional provision which exempts it from paying *property* taxes. (See *ante*, fn. 3.)

[11] Although the *Livermore* court did not focus on it, our heading of Health and Safety Code section 5471 suggests the Legislature possessed a similar view. That section, pursuant to which the Water District's capacity fee was imposed, authorizes the collection of "fees, tolls, rates, rentals or other charges . . for services *and facilities* furnished by the sewer district] . . ." (Emphasis added.) The statute further specifically provides that revenue from such charges may be used to acquire or construct sewer facilities (i.e., capital improvements). In view of the specific contemplation of capital costs, we think it highly significant the Legislature omitted the term "assessments" from the generic list of charges. Implicit in the wording of the statute, we believe, is the Legislature's understanding that a user charge does not become a special assessment merely because it is used to defray the cost of capital improvements.

V

We are thus faced with a situation in which the rationale of a series of three recent Court of Appeal opinions, with which we have already expressed our concern, is inconsistent with the weight of authority from other states and is arguably inconsistent with language in a California Supreme Court decision. Significantly, neither *Riverside* nor either of the *Regents* decisions discuss the out-of-state authority or cite the Supreme Court's opinion in *Livermore*. Under such circumstances, we think it appropriate to briefly analyze the rationale underlying the rule which generally exempts public agencies from special assessments.

As previously noted, the special assessment exemption derives by analogy from the constitutional exemption from property taxation enjoyed by public agencies. That rule arose at a time when there were far fewer local agencies whose boundaries much less frequently overlapped. The exemption of public property from taxation was viewed as avoiding the necessity of a municipality assessing its own property. (See Holbrook & O'Neill, *California Property Tax Trends: 1850-1950* (1951) 24 So.Cal.L.Rev. 252, 268.) To the extent local agency boundaries did overlap, the transaction costs associated with inter-entity tax payments were apparently perceived as outweighing any theoretical advantages in terms of tax equity.[12]

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[12] The theoretical inequity of the tax exemption can be illustrated if we assume a small public entity located entirely within a considerably larger public entity. We can further assume the large entity owns significant amounts of property within the small entity's boundaries but that the small entity owns very little property. Normally we would expect that any burdens created by a public agency will be borne equally by all its taxpayers. But if the large entity's property is exempt from

It is because special assessments are viewed as being within the government's taxing power (see *Inglewood* v. *County of Los Angeles, supra,* 207 Cal. at p. 703) and are clearly levied on property that the analogy to the property tax exemption developed. While there is a clear difference between a tax for general governmental purposes imposed on ability-to-pay principles and an assessment for a specific improvement levied on benefit principles, the facial similarity has been seen as sufficient to justify the implied exemption. (*Id.*, at pp. 703-704.)

Where there is no necessary relationship between the amount of a tax and the amount of benefits received from governmental services (i.e., where a tax is imposed on an ability-to-pay principle), it is arguable that the transaction costs associated with assessing public agencies do not justify the results, especially in view of the theoretical difficulties involved in determining the "ability-to-pay" of a governmental body. Even in the case of a special assessment, where the benefits received are solely related to increases in the value of the subject property, such a benefit is perhaps less useful to a public agency which is not in business to make a profit. But where the benefit to the public entity is direct, defined as in the present case in terms of use of a service, there is no more reason to exempt the agency from payment of the charge than there is to exempt it from paying private businesses for goods delivered and services rendered.

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taxation, the tax burden on the small entity's taxpayers must be correspondingly increased. This results in a situation where small entity taxpayers effectively subsidize large entity taxpayers who do not also reside within the small entity.

VI

The general rule with respect to tax exemptions is that they should be strictly construed against the person or entity claiming the exemption. (See *Cedars of Lebanon Hosp.* v. *County of L.A.* (1950) 35 Cal.2d 729, 734.) While this general rule has been held inapplicable to exemptions in favor of public agencies (see *Pasadena* v. *County of Los Angeles* (1920) 182 Cal. 171, 174), this rule of liberalized construction has only been invoked where a tax exemption is express. Where a tax exemption is created neither by constitution nor statute but is rather a creature of judicial interpretation (see *ante*, fn. 3), we believe the general rule is more appropriate and the implied exemption must be strictly construed. So construed, and in view of the abundant precedent from other states sustaining similar sewer capacity charges coupled with the supportive language in the Supreme Court's *Livermore* opinion, we conclude the School District is to impliedly exempted from paying the Water District's capacity fee. The capacity fee does not constitute a special assessment for the purposes of the implied exemption because it is not assessed against all property benefited by the sewer system but is only imposed on users of the system whose use gives rise to the need for additional sewer capacity.[13]

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[13] The School District argues that even if the capacity fee is not properly characterized as a special assessment, the Water District has failed to demonstrate that the amount of the fee "does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged . . ." within the meaning of Government Code section 50076. (See *Beaumont Investors* v. *Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227.) Accordingly, it suggests that the capacity fee, lacking a two-thirds voter approval, is an invalid "special tax" under article XIII A, section 4 of the California

We do not reach this conclusion lightly. We recognize that it places us in conflict with the holdings of at least two other division of the Court of Appeal. Despite our respect for the principle of state decisis, however, we believe those courts' failure to consider the arguments and precedent we have discussed here mandates our taking a fresh look at the question. Our contrary conclusion is a function of those different arguments and additional precedent.[14]

DISPOSITION

Judgment affirmed.

CERTIFIED FOR PUBLICATION

/s/ WIENER, J.

I CONCUR:

/s/ BUTLER, J.

Constitution. (*Ibid.*)

The School District's contention is raised for the first time on this appeal. The Water District had no opportunity to make a record on this issue in the trial court. Our holding here that the capacity fee is not an invalid special assessment should not be read to preclude a subsequent challenge to the fee based on section 50076. As a footnote, however, we observe that special assessments do not constitute "special taxes" within the meaning of article XIII A, section 4. (See *J. W. Jones Companies* v. *City of San Diego* (1984) 157 Cal.App.3d 745, 753-754.)

[14] In view of our conclusion that its capacity fee does not constitute a special assessment, we need not reach the Water District's additional contentions that the Legislature has specifically authorized its collection from public agencies so as to negate any implied exemption. (See *ante*, pp. 5-6.)

I respectfully dissent.

The issue presented in this case is whether the San Marcos Water District (Water District) may impose on the San Marcos Unified School District (School District) a "sewer capacity right fee" which is used by the Water District to fund capital improvements.

The majority refuses to follow the clear reasoning and the general rule found in the California Supreme Court decision of *Inglewood* v. *County of Los Angeles*, 207 Cal. 697, 703-704.[1] The majority would in effect overrule three precisely-in-point appellate decisions, *Regents of University of California* v. *City of Los Angeles*, 100 Cal.App.3d 547 (hg. den.) (*Regents I*); *Regents of University of California* v. *City of Los Angeles* (*Regents II*), 148 cal.App.3d 451 (hg. den.); and *County of Riverside* v. *Idyllwild County Water Dist.*, 84 Cal.App.3d 655, that rely on *Inglewood, supra,* as the foundational authority. The majority ignores, refuses to follow two well-reasoned opinions of the Attorney General, 19 Ops. Cal.Atty.Gen. 195, and 67 Ops. Cal.Atty.Gen 13. The reasoning underlying this abandonment of controlling long-standing precedent as well as a fundamental constitutional aversion to allow one taxing body to assess another taxing body (without express legislative authority) for capital improvement is difficult to grasp and evaluate. Learned discourse on economic philosophy or out-of-state cases resting on different statutory-constitutional judicial concepts, while of academic interest, have little to no persuasive value. Our

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[1] "While publicly owned and used property is not exempt from *special assessments* under the constitution or statutory law of this state, *there is an implied exemption of such property from burdens of that nature.*" (*Inglewood* v. *County of Los Angeles, supra,* at p. 703, italics added.)

own Constitution, as interpreted by the California Supreme Court, binds us, controls our decisions.

The parties' stipulated statement of facts shows Water District and School District serve roughly the same community. School District is larger but all of its school sites are located within Water District's boundaries. Water District has been handling sewage for the property involved here since 1971.

Water District charges School District and its other customers three types of fees: (1) a connection fee when the customer's property is initially connected to the district's sewer system; (2) a monthly sewer service charge computed based on an estimated amount of sewage discharged monthly; and (3) a one-time capacity fee computed based on anticipated sewage discharge. The capacity fee is "a primary source of funds for the development of additional capacity and [is set] at a level which will defray the costs of providing additional sewage treatment and/or reclamation facilities, major trunk and transmission pipelines and facilities for pumping when such facilities are needed." (San Marcos Water District Ordinance, No. 47-6, art. X, § 4.) The School District disputes only the applicability of the capacity fee.

I

Under the California Constitution, public schools are exempt from property taxation. (Cal. Const., art. XIII, § 3.) The California Supreme Court has held there exists also an implied exemption for public property from special assessments. (*Inglewood* v. *County of Los Angeles, supra,* 207 Cal. 697, 703.) Unless the Legislature has expressly authorized a special assessment, public property is exempt.

(*County of Riverside* v. *Idyllwild County Water Dist., supra,* 84 Cal.App.3d 655, 659-660.)

A special assessment is a charge imposed on property owners in a limited area to help pay for a local improvement designed to enhance property value in that area. (*Regents of University of California* v. *City of Los Angeles, supra,* 100 Cal.App. 3d 547, 549.) Whether a charge is a special assessment depends on the purpose of the disputed charge, not on whether the charge is calculated based on actual use rather than property value. (*Regents of University of California* v. *City of Los Angeles, supra,* 148 Cal.App. 3d 451, 455.) Similarly, it is irrelevant that the public entity benefits from the capital improvements; it is exempted from property taxations and special assessments and is not required to contribute to its capital costs. (*Regents II, supra,* 148 Cal.App.3d 451, 456.) A sewage fee, used to provide capital for sewer construction, is a special assessment which may not be imposed on state or local government property absent express legislative authorization. (*Regents II, supra,* 148 Cal.App.3d 451; *Regents I, supra,* 100 Cal.App.3d 547; *County of Riverside* v. *Idyllwild County Water Dist, supra,* 84 Cal.App.3d 650, 655.)

II

Water District contends the capacity fee is authorized by the Education Code[2]

The Education Code requires a school district to consider "waste disposal facilities" when evaluating potential school

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[2] All statutory references are to the Education Code unless otherwise specified.

sites (§ 39002) and to provide "water closets" for its students (§ 39612). The code also permits a school district to enter into an agreement with a water district for the installation charges for sewer service (§ 39011), to dedicate land or grant an easement for sewers (§ 39540), to construct sewers on or in close proximity to school property (§ 39606) and, without regard to proximity, to construct adequate systems "to treat and/or dispose of sewage and drainage" or "acquire adequate disposal rights in systems constructed or to be constructed by others for these purposes." (§ 39613.)

Water District asserts section 39613's language permitting a school district to "acquire *disposal rights* in systems constructed or to be constructed *by others*" (emphasis added) is the express legislative authorization for its capacity fee.

The Legislature enacted section 39613's predecessor (§ 15811) as an urgency measure in 1950 in response to the rapid growth of schools and attendant sewage disposal problems. Prior to its enactment, school districts lacked explicit authority to use their funds, including building funds,[3] to construct sewage treatment and disposal facilities and were limited to constructing sewers on or adjacent to their property. (See § 39606 (former Ed. Code (1959) § 15804, Ed. Code (1943) § 18003); *Los Angeles City School Dist.* v. *Payne*, 219 Cal. 106.) Section 39613 was designed to alleviate these problems, i.e., to allow school districts to use their funds to construct systems either exclusively for their

---

[3] In the original section, school districts were required to use only building funds for sewage treatment and disposal systems. In 1959, the Legislature amended this section to make the use permissive rather than mandatory.

own use or in conjunction with orders without regard to proximity.

Contrary to Water District's assertion, the authorization to "acquire disposal rights in systems constructed or to be constructed by others" does not equate with an authorization to impose a capacity fee. Rather, the Legislature intended by this language to permit a school district the option of using its buildings funds to acquire an ownership interest in a system with others, an alternative that might provide for sewage disposal in a more economical manner than either constructing its own system (§ 36913) or contracting with a water district (§ 39011). This sentiment is echoed in Water Code section 31049 which permits a water district and public entity to enter a contract "for the joint construction, acquisition, disposition or operation of any property or works of a kind which might be constructed, acquired, disposed of or operated by the district."

Moreover, the Legislature in Education Code section 39609 (former Ed. Code (1959) § 15806, Ed. Code (1943) § 18005), expressly authorized school districts to "appropriate money to pay *assessments*, for the improvement of streets." (Italics added.) Had the Legislature intended school districts to be subject to assessments for sewage treatment facilities, it could have easily have said so, as it did for street improvements in section 39609. The fact it did not authorize such an assessment in section 39011 or 39613 while it did so in section 39609 supports the conclusion the omission was intentional. (*Inglewood* v. *County of Los Angeles, supra,* 207 Cal. 697, 707-708.)

III

Alternatively, Water district argues its capacity fee is authorized by the Water Code.

Water District points to Water Code sections authorizing it to contract with any public agency for sewer outfall facilities (§ 31100), to "prescribe, revise and collect rates or *other charges* for [its] services and *facilities*" (§ 31101, italics added), to enter into an agreement with a public agency for the "joint construction, acquisition, disposition or operation of any property or works" which a water district might construct or operate (§ 31049), and to "supply sewage and waste services to property not subject to district taxes at special rates, terms, and conditions as are determined by the board for the services (§ 31101.5).

While these sections may authorize a water district to enter into contracts with public agencies for sewage treatment or for joint ownership and generally allow the assessment of fees for improvements, none of the sections expressly authorize a water district to impose such fees against public property. The California Supreme Court made it clear that a general grant of authority to assess real property for improvement of sewer facilities will not be read to authorize such an assessment of public property. (*Inglewood* v. *County of Los Angeles, supra,* 207 Cal. 697, 707-708.)

IV

Water District contends School District signed a contract to pay the capacity fees and is bound by it. This argument was disposed of in *County of Riverside* v. *Idyllwild County Water Dist., supra,* 84 Cal.App.3d 655, 659, where the court

reasoned "whether the [tax-exempt entity] can agree to pay the charge depends upon whether the district has the power to impose it." If the District does not have the authority to impose the charge, then the tax-exempt entity's agreement "to pay [the] invalid charge would amount to a gift of public funds in contravention of article XVI, section 6, of the California Constitution." (Id., at p. 660). The court concluded: "The charges are in effect a special assessment under a different name and constitute an attempt by the district to do indirectly that which it could not do directly." (*Ibid.*)

Nor does the doctrine of equitable estoppel apply since there is a strong public policy against one public entity taxing or assessing another public entity (see *Eisley* v. *Mohan*, 31 Cal.2d 637, 642; *Inglewood* v. *County of Los Angeles, supra*, 207 Cal. 697, 703-704; *Regents II, supra*, 148 Cal.App. 3d 451, 454, fn. 2) and estoppel will not be applied against the government if it would annul a strong rule of public policy (*City of Long Beach* v. *Mansell*, 3 Cal.3d 462, 493).

I would reverse the judgment.

CERTIFIED FOR PUBLICATION.

/s/ STANIFORTH, ACTING P.J.

APPENDIX C

FILED
Robert D. Zumwalt, Clerk
JAN 31, 1984
BY

SMITH & PELTZER, A.P.C.
Attorneys at Law
751 E. Rancheros Drive, Suite 2
Vista, California 92083
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Attorneys for Plaintiff

IN THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO
NORTH COUNTY JUDICIAL DISTRICT

In the Matter of the Agreed Case Between

No. N24145

SAN MARCOS COUNTY WATER DISTRICT,

Plaintiff,

and

SAN MARCOS UNIFIED SCHOOL DISTRICT,

Defendant.

JUDGMENT ON AGREED CASE

The above-named parties have submitted a controversy on Agreed Case, duly verified by a declaration as required by Section 1138 of the Code of Civil Procedure. On

January 13, 1984, in Department A of the above-entitled court the Honorable F.V. LOPARDO, Judge of the Superior Court after examining the Agreed Case, after hearing oral argument from VERNON A. PELTZER, Attorney for Plaintiff and LINDA M. WOOLCOTT, Attorney for Defendant, and after due deliberation, finds on the facts submitted that:

1. Pursuant to the Education Code, particulary Section 39613, Defendant SAN MARCOS UNIFIED SCHOOL DISTRICT has a duty to provide sewerage service to schools and has entered into a contract with the SAN MARCOS COUNTY WATER DISTRICT for the disposal of sewage including the payment of sewage capacity fees.

Education Code § 39613 provides:

Sewers and Drains

"In addition to the other powers granted the governing board of each school district may provide sewers and drains adequate to treat and/or dispose of sewage and drainage on or away from each school property. For this purpose it may construct adequate systems or aquire adequate disposal rights in systems constructed or to be constructed by others for these purposes without regard to their proximity. The cost thereof may be paid from the building fund, including any bond moneys therein. (Stats.1976, c. 1010 § 2, operative April 30, 1977.)

2. Although the Court's ruling is based upon the authority provided in the Education Code, the Court also finds that Water Code § 31101.5 is not applicable until January 1, 1983 and this section now gives the SAN MARCOS COUNTY WATER DISTRICT the right to impose the fees it has imposed.

IT IS HEREBY ADJUDGED AND ORDERED that Plaintiff SAN MARCOS COUNTY WATER DISTRICT have judgment against Defendant SAN MARCOS UNIFIED SCHOOL DISTRICT for all amounts owing as capacity fees billed but unpaid together with interest at 7% per annum up to the time of Judgment and 10% per annum on said amount thereafter until paid.

Dated: JAN 31 1984

F.V. LOPARDO
Judge of the Superior Court

Approved as to form and content:

Dated : _____, 1984

_____

HIGGS, FLECTHER & MACK by
LINDA M. WOOLCOTT, Attorneys for
SAN MARCOS COUNTY UNIFIED
SCHOOL DISTRICT

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SAN MARCOS COUNTY WATER DISTRICT,
Plaintiff and Respondent,

v.

SAN MARCOS UNIFIED SCHOOL DISTRICT,
Defendant and Appellant.

L.A. No. 32134

PETITION FOR REHEARING

SMITH & PELTZER, A.P.C.
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SAN MARCOS COUNTY
WATER DISTRICT

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To the Honorable ROSE BIRD, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California, the SAN MARCOS COUNTY WATER DISTRICT ("WATER DISTRICT") requests a rehearing and reargument and offers the following points and authorities on eminent domain, equal protection and burden of proof to assist the Court in reevaluating the legal issues previously presented.

THE DECISION

The issue on appeal before the Supreme Court is whether the SAN MARCOS UNIFIED SCHOOL DISTRICT ("SCHOOL DISTRICT") is obligated to pay sewer capacity fees charged by the WATER DISTRICT. The capacity fees are used by the WATER DISTRICT to fund capital improvements. In the decision the Court concluded that the SCHOOL DISTRICT is not required to pay because the capacity fee is an assessment which has not authorized by the Legislature, and that the SCHOOL DISTRICT is not bound to pay the fee by either contract or promissory estoppel. The Court held that *private customers must pay the school's (public entity) share*, viz:

> "Our conclusion does not mean that the water district cannot collect money for capital improvements from its customers; it simply means that the *private* customers will pay the entire cost of capital improvements. Public entities, such as the school district, will not be required to allocate their limited tax revenues to pay for capital improvements built by the sewer district." *Decision, p. 2.*

POINT ONE

THE DECISION MANDATES A VIOLATION OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 19 OF THE CONSTITUTION OF THE STATE OF CALIFORNIA.

A

THE DECISION MANDATES A TAKING OF *PRIVATE* PROPERTY IN VIOLATION OF THE FIFTH AMENDMENT OF THE FEDERAL CONSTITUTION.

The Fifth Amendment provides in part:

> "[N]or shall private property be taken for public use, without just compensation."

In *United States of America v. 129.4 Acres of Land and Yuma Mesa Irrigation and Drainage District* 789 Fed. 2d 715 (9th Cir. 1986), the Court held that when the United States takes benefited property by eminent domain and makes use of the facilities benefiting the property, the United States must pay the related assessments imposed for operation, maintenance, and *capital costs.* The failure to pay would decrease the assessment base and shift the added cost to other users in violation of the Fifth Amendment. *Ibid.* In *United States of America v. 129.4 Acres of Land* 572 Fed.2d 1385 (9th Cir. 1978), the Court held that a special district must be compensated for the decrease in the assessment base caused by the condemnation.

Assuming arguendo that the fee in this case is an assessment, to allow the SCHOOL DISTRICT to take

(confiscate) capacity rights, paid for by private users without payment of the assessment, would be contrary to the Constitution as expounded in the *United States v. 129.4 Acres of Land* cases *supra.* and is in violation of the Fifth Amendment.

The incompatibility and lack of viability of *City of Inglewood v. County of Los Angeles* (1929) 207 Cal. 697 (which did not address this constitutional issue) with the Ninth Circuit Fifth Amendment decisions was raised in the supplemental authorities and the response to SCHOOL DISTRICT's late submission at the hearing and also stated in oral argument in response to a question from Justice Mosk.

B

THE DECISION MANDATES A VIOLATION OF THE CALIFORNIA CONSTITUTION AS IMPLEMENTED BY THE LEGISLATURE.

The California State Constitution, Article I, Section 19 provides in part:

> "private property may be taken or damaged for public use only when just compensation, . . . has first been paid to, . . . the owner."

This section and the Fifth Amendment to the United States Constitution guarantee the right not to have property taken without just compensation. The SCHOOL DISTRICT, by utilizing capacity and capital improvements of the WATER DISTRICT'S sewer system and not paying, is taking property paid for by private users (the contract right to discharge sewage into the WATER DISTRICT's system) without just compensation. For eminent domain purposes,

"property" includes any type of right, title, or interest in real or personal property that may be acquired for public use. *Cal. Law Revision Com. com. to Code of Civil Procedure § 1235.170; CCP § 1235.170 and § 1240.110.*

Under California law, a taking by one public entity of the property of another public agency is a condemnation regulated by statute. *CCP §§ 1240.610, et seq.* The Statute provides for taking for either a compatible or a more necessary use. *CCP §§1240.510, et seq.* and *§§ 1240.610, et seq.* Payment is required. *CCP §§ 1255.010, et seq.*; §§ 1263.010, et seq. A failure to follow proper procedures (more necessary public use) is fatal to the eminent domain action. *Pacific Gas & Electric Co. v. Superior Court of Trinity County; Hayfork Valley Public Utility District* (1986) 180 Cal.App.3d 770. A school is a "public entity". *CCP §§ 1235.150 and 1235.190*

POINT TWO

THE DECISION MANDATES A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 7 OF THE STATE CONSTITUTION.

A

THE REQUIREMENT OF EQUAL PROTECTION.

The equal protection clause of the Fourteenth Amendment of the United States Constitution *commands* that no state shall deny any person the equal protection of the laws. *City of Cleburne v. Cleburne Living Center* __ U.S. __ 105

S.Ct. 3249, 3254 (1985). This requires that "all persons similarly circumstanced shall be treated alike." *Tyler v. Doe* 451 U.S. 202, 216 (1982); "*F.S.*" *Royster Guano Co. v. Virginia* 253 U.S. 412, 415 (1920). Article I, Section 7 (a) of the California Constitution provides for due process and equal protection of the law.

As recently stated by this Court in *Young v. Haines* (June 5, 1986), 86 Daily Journal D.A.R. 2033, 2034:

> "As the United States Supreme Court recently phrased the federal constitutional standard:
>
> 'The Equal Protection Clause . . . den(ies) to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." ' (Quoting *Reed v. Reed* (1971) 404 U.S. 71, 75-76, and other citations.) Thus, when a statute provides that one class shall receive different treatment from another, our constitutional provisions demand more 'than nondiscriminatory application within the class . . . establish (ed) . . . . (They) also (impose) a requirement of some rationality in the nature of the class singled out.' (Citations)" (*Brown v. Merlo, supra*, 8 Cal.3d at pp. 861-862. emphasis omitted.) The equal protection clause of the California Constitution (*Cal.Const., art. I, sec. 7*) also requires some rational relationship between the legislative goal and the class singled

out for unfavorable treatment. (*Brown, supra* at pp. 861, 882.)

A statutory classification "must involve something more than mere characteristics which will serve to divide or identify the class. There must be inherent differences in situations related to the subject-matter of the legislation. . . ." (*Heckler v. Conter* (Ind. 1933) 187 N.E. 878, 879.)

B

THE CLASSIFICATION

The Court's decision mandates that "private customers" of the area served by the WATER DISTRICT are subject to discrimination — they must pay taxes to support the schools; pay capacity fees for their own use and an override for the *entire cost of capital improvements provided by the WATER DISTRICT to the SCHOOL DISTRICT.*

Persons residing outside the water district who use the school (public hospital, prison, etc.) do not pay the override. There is no rational basis for the difference. It rests on chance, the place of residence, and the situs of the public entity. This is contrary to the constitutional doctrine of equal protection of the laws.

C

THE CLASSIFICATION FAILS THE EQUAL PROTECTION TEST.

The requirement to pay the override is not based on ability to pay. It is not levied statewide on a uniform basis. It

imposes costs on the local community which, as mandated by this Court in *Serrano v. Priest* (1976) 18 Cal.3d 728, is the responsibility of the State to obviate local financing as a violation of equal protection in education. The cost of building and operating schools is a State, not local, responsibility. As subsequently noted, the State has the funds and system to meet this duty.

To justify the difference in classification between those who must pay the override and those not paying the surcharge, there must be a rational basis for the difference. This requires (1) a legitimate purpose and (2) a classification which promotes the purpose. *Hoffman v. United States* 767 Fed.2d 1431, 1436-1437 (9th cir. 1985).

At bench the lynchpin for the decision is application of the *Inglewood, supra.* case decided in 1929. The Court did not reevaluate that decision. That case has been drained of all vitality by subsequent events, including the Ninth Circuit decisions discussed in POINT ONE and the absence of any discussion of Federal and State Eminent Domain Law. The comprehensive State Eminent Domain Law was operative on July 1, 1976, after the *Inglewood* decision.

The purpose of the Court created (not a legislative creation) *Inglewood* assessment *implied* exemption is to avoid impairment of the exercise of government powers.

The historical basis for a tax or assessment exemption is the prohibition against enforcing a lien on public property (selling the property to enforce the lien). Amicus Chico Brief, pp. 11-14. That rational has no application to a sewer capacity fee. *Ibid,* pp.13-14. A user fee is not a basis for a lien.

A public agency is not subject to a mechanic's *lien, Ibid.,* pp. 12-13, but a public agency does not get capital improvement benefits for free; a *"stop notice"* is used to

extract payment, not a lien. *CCP §§-3179-3214. The stop notice does not become a lien merely by serving the same purpose — to enforce payment.* The fallacious "purpose" test is not accepted by drafters of comprehensive legislation or the Legislature.

The other reason for an exemption from *ad valorem* taxation is that the object of taxation is revenue and none results from State taxation of its own property. *Eisley v. Mohan* (1948) 31 Cal.2d 637, 642. That is not the issue here. At the bench the question *is which residents are the source of funds to pay the capacity fee* for the SCHOOL DISTRICT.

Factually there is no impairment of the school function in this case. There is no attempt to regulate or impose liens or levy an ad valorem tax on the school. There is aid, not impairment, for education by providing sewer facilities at far less cost than the school could provide the facilities, the alternative required by the Education Code § 39613. The SCHOOL DISTRICT paid fees from 1971 to 1979 without impairing education and then stopped payment on a legal, not factual impairment, basis. The Appellate Court decision demonstrates conclusively that sister States pay user-impact fees and the functioning of their government is not impaired.

There are *no facts* in this record showing that education (or other government functions) will be impaired by paying user (capacity) fees. The belated $66.24 Million self- serving cost statement, by the Los Angeles Unified School District, is unaudited and based on speculation and conjecture. It is not based on the Los Angeles capacity fee nor related to incremental payments over a period of time. It is not in the Agreed Case or subject to judicial notice and is not properly before this Court as a basis for decision any more than the

comparable cost-fee relationship excluded by the Court. *Decision, p. 21-22.*

There being no valid purpose served by the classification into payers of the override and nonpayers of the surcharge, there is a denial of equal protection of the laws as defined by the Ninth Circuit (and the United States and California Supreme Courts).

An attempt to surcharge private users to pay the SCHOOL DISTRICT's fee would be a forbidden special tax. *Government Code §§ 50076 and 54992* (charges exceeding the reasonable cost of providing the service is a "special tax" requiring a two-thirds voter approval). *Beaumont Investors v. Beaumont Cherry Valley Water District* (1985) 165 Cal.App.3d 287; *California Constitution, Articles 13A and 13B.*

This is not a case of exchanging tax dollars between public agencies, but a case of *which citizens* — consistent with the Federal and State Constitution and State statutes — must pay the bill.

There is no need for (or purpose served by) this classification. The State has funding sources of a magnitude not applicable to the WATER DISTRICT or residents of the WATER DISTRICT. Illustratively, the State has an *excellent bond rating* and the ability to spread costs over a wide population base. The State is responsible for funding education. In addition to the Lottery, the State has a fund balance, as of June 30, 1985 of $1,400,210,818.00, *State of California Annual Report*, 1984-85 Fiscal Year, pp. A-8 and A-9 (Exhibits A-1 and A-2), an increase from $490,621,849.00 at the begining of period, June 30, 1984. (This impartial source is not a party to this litigation, as is the self-serving speculation of Amicus Los Angeles Unified School District cited by the Court in Footnote 2, p.4).

POINT THREE

THE BURDEN IS ON THE SCHOOL DISTRICT TO DEMONSTRATE THAT PUBLIC ENTITIES ARE EXEMPT FROM PAYMENT OF USER FEES.

California Constitution Article 13, Section 3 exempts public entities from ad valorem property taxes *only*. The Legislature did not create an exemption from assessments. This is a Court created implied exemption . *Inglewood, supra.* The burden is *not on the WATER DISTRICT* to demonstrate specific legislative authorization for payment of the user fee, the burden is on the SCHOOL DISTRICT to demonstrate an exemption. Exemptions are strictly construed, and the public entity claiming the exemption has the burden of showing clear entitlement. *Cedars of Lebanon Hosp. v. County of Los Angeles* (1950) 35 Cal.2d 729 at 734-735.

At bench the Court has *expanded* the defunct *Inglewood* decision to include user fees, despite the fact that Federal and State eminent domain and equal protection laws precludes that course of action. *POINTS ONE and TWO.* The WATER DISTRICT is required to employ user fees by State law. *Government Code § 16270.* The WATER DISTRICT, as a member of Encina, is required to employ user fees, and users include "institutional users" [schools]. *State Water Control Board Letter* dated September 5, 1985 and *Clean Water Grant Bulletin*, April 20, 1980, Exhibits B1, B-2, and B-3, attached.

The opinion does not hold that a "user fee" is an "assessment". The opinion could not reach that conclusion

considering the different characteristics, including but not limited to, voluntary-involuntary, impact-value benefit.

Instead, the Court, contrary to the rule against expanding exemptions, includes user fees in the exemption as a matter of expedience (to avoid easy manipulation, Decision, p. 15).

The "policy" of the *Inglewood* exemption (whatever that may be) is not legislative, it is *not served*, it is contrary to the Federal and State Constitutions, *POINTS ONE and TWO*, and this Court's *Serrano* decisions, and is unnecessary since the State has the funds to pay the cost, *POINT TWO*, and the State has the mechanism for removing *local* wealth-related disparities for *School financing, School Finance Cases (Placentia Unified School District, et al) v. Riles* (May 15, 986) 86 Daily Journal D.A.R. 1702.

CONCLUSION

It is respectfully requested that the Court grant a rehearing and reargument in this case. There are issues which deserve more consideration and explanation by the Court for the guidance of public entities involved in municipal finance.

The Court did not address the issue of whether the use of the WATER DISTRICT'S sewer capacity by the SCHOOL DISTRICT violates the Fifth Amendment of the Federal Constitution and Article I, Section 19 of the State Constitution which prohibit taking of property without compensation. The Court did not address the issue of the denial of Equal Protection of the private customers who will have to pay both their own costs and the entire costs of capital improvements which are used by the SCHOOL DISTRICT. The decision also did not address the issue that the SCHOOL DISTRICT had the burden of demonstrating

an exemption from user fees or the total absence of any need for the exemption which forces a local community to discharge an obligation of the State.

With the exception of the annual report (not previously available) and the State Water Resources Control Board materials (both subject to judicial notice) no new facts are added to support the issues previously raised but left unresolved.

Neither the trial court nor the Appellate Court, having based their decisions on contract and user fees, respectively, were required to resolve the constitutional issues which must be resolved in the decision of this Court.

Respectfully Submitted,

SMITH & PELTZER, A.P.C.

By: /s/ VERNON A. PELTZER

Attorneys for Plaintiff / Respondent
SAN MARCOS COUNTY
WATER DISTRICT

GENERAL FUND
STATEMENT OF FINANCIAL CONDITION
(Legal Budgetary Basis)*
June 30, 1985

ASSETS	
Cash in State Treasury and Agency Accounts	$1,276,726,049
Receivables (See Note 5)	82,082,138
Due from Other Funds (See Notes 4 and 5)	1,083,552,386
Due from Other Governments	12,601,546
Prepaid Expenses	102,265,575
Advances to Other Funds	129,633,513
Other Assets	293,088
Total Assets	$2,687,154,295

LIABILITIES	
Accounts Payable (See Note 1b)	$552,548,157
Due to Other Funds (See Note 6)	443,346,593
Due to Other Governments	196,848,522
Accrued Interest Payable	47,621,501
Advance Collections	30,054,852
Deposits	89,824
Other Liabilities	16,434,028
Total Liabilities	$1,286,943,477
FUND BALANCE	
Designated for Unencumbered Balances of Continuing Appropriations	$63,119,240
Contingency Reserve for Economic Uncertainties	1,337,091,578
Total Fund Balance, June 30, 1985	$1,400,210,818

Exhibit A-1

LONG-TERM OBLIGATIONS

Amount to be Provided from Future Revenue and School Districts for Retirement of Long-Term Obligations	$5,159,613,023
General Obligations Bonds	$7,580,097,000
Less: Self-Liquidating Bonds	-4,232,027,000
Net General Bonded Debt	3,348,070,000
Interest Payable in Future Years	1,811,543,023
Net Long-Term Obligations	$5,159,613,023

GENERAL FUND FIXED ASSETS

General Fund Investment in Fixed Assets (See Note 1d)

* In compliance with state laws and regulations

Exhibit A-1

GENERAL FUND
STATEMENT OF REVENUES, EXPENDITURES AND CHANGES IN FUND BALANCE
FOR THE FISCAL YEAR ENDED JUNE 30, 1985
(Legal Budgetary Basis)*

Fund Balance—Beginning of Period, June 30, 1984	$490,621,849
Restatements	
Prior Year Revenue, Accrual Adjustments	2,120,547
Prior Year Expenditure, Accrual Adjustments	38,011,420
Fund Balance—Beginning of Period, as Restated	$530,753,816
Revenues	$26,552,400,667
Other Financing Sources—	
Transfers from Other Funds	53,490,121
Other Additions	20,652,320
Total Revenues and Other Sources	$26,626,543,108

Exhibit A-2

Expenditures	
State Operations	$5,660,071,257
Local Assistance	19,928,534,548
Capital Outlay	9,155,026
Other Uses—	
Transfers to Other Funds	159,325,275
Total Expenditures and Other Uses	$25,757,086,106
Excess of Revenues and Other Sources Over Expenditures and Other Uses	$869,457,002
Fund Balance	
Designated for Unencumbered Balances of Continuing Appropriations	$63,119,240
Contingency Reserve for Economic Uncertainties	1,337,091,578
Total Fund Balance, June 30, 1985	$1,400,210,818

---

* In compliance with state laws and regulations

Exhibit A-2

STATE OF CALIFORNIA (Letterhead)

RECEIVED
Sep 09 1985
EWPCF

In Reply Refer
to: 550: FP

STATE WATER RESOURCES CONTROL BOARD
DIVISION OF CLEAN WATER GRANTS
PAUL R. BONDERSON BUILDING
xxx P STREET
P.O. Box 100
SACRAMENTO, CALIFORNIA 95801

Sep 5 1985

Mr. Richard W. Graff
General Manager
Encina Water Pollution Control Facility
6200 Avenida Encinas
Carlsbad, CA 92008-0171

Dear Mr. Graff:

REVENUE PROGRAM APPROVAL FOR WATER POLLUTION CONTROL GRANT NO. C-06-1016-210, 220, 230, 240, 250 AND 270, VISTA SANITARY DISTRICT

The final Revenue Program for the subject project is hereby approved for compliance with State and Federal regulations for User Charges. Therefore, progress payments, as they relate to the requirements of 40 CFR 35.2208, are authorized beyond 90 percent of the Federal share of your Step 3 grant.

EXHIBIT B-1

Upon completion of the project, implementation and maintenance of the user charge system becomes a condition of the grant. 40 CFR 35.2208 requires that the user charge system and sewer use ordinance be implemented for the useful life of the treatment works. The California State Water Resources Control Board, Division of Clean Water Grants, must be notified when either of these ordinances/resolutions is changed. Your agency will be subject to the provisions of 40 CFR 30.430 of Chapter 1 of the Federal Regulations in the event of non-compliance with these requirements. In addition, your agency must maintain records necessary to document compliance with these requirements.

Any questions you may have regarding the contents of this letter should be referred to Frank E. Peters of the California State Water Resources Control Board, Division of Clean Water Grants, at (916) 322-6558.

Sincerely,

/s/ Kurt Wassermann, Chief
Engineering Branch
Clean Water Grant Program

CLEAN WATER GRANT PROGRAM
BULLETIN

STATE WATER RESOURCES CONTROL BOARD
Division of Water Quality

Raymond Walsh, Chief

Manager, CLEAN WATER GRANT PROGRAM
P.O. Box 100 Sacramento, California 95801

April 24, 1980

NO. 54B - REVENUE PROGRAM GUIDELINES FOR WASTEWATER AGENCIES

Attached for your information and use is the final edition of the Revenue Program Guidelines adopted by the State Water Resources Control Board on April 17, 1980.

There is a moratorium on the collection of Industrial Cost Recovery (ICR), described on page 3, until June 30, 1980. During this period, grantees must calculate ICR, but are not required to collect it until July 1, 1980. The Division of Water Quality will notify all grantees when ICR is reinstituted. See 40 CFR 35.928-4 for more detailed information on the moratorium.

Clean Water Grant Bulletin 54A, dated February 14, 1978, is superseded.

EXHIBIT B-2

Any questions should be directed to Frank Peters, Financial Management Unit, at (916) 322-6558.

/s/ Raymond Walsh
Division Chief
Manager - Clean Water Grant Program

Attachment

Section 3 - Identification of Users

After the annual revenue requirements are determined, the users of the treatment works and the characteristics of their wastewater must be identified. Flows and loadings (BOD_5 and SS) must be documented for the user groups listed below, so that proportional costs can be calculated. The methods for allocating the annual costs to various types of users is described in Section 4 of this Article.

A. **Industrial Users**. Industrial users subject to ICR must have costs allocated individually.

B. **Residential Users**. Individual cost allocations need not be made for various type of residential users. However, grantees may wish to divide residential users into single-family, multiple-family, or mobile home sub-groups to allow for more refined cost allocations.

C. **Commercial Users**. Because of great variability in waste characteristics, the commercial group should be divided into sub-groups defined in Appendix F. The flow and loads given in Appendix F need not be used if the grantee has supportable data relating to other specific flows and loads. Large commercial users subject to ICR must have costs allocated individually.

D. **Institutional Users**. Costs may be allocated to individual users or to user groups, such as public or private hospitals, convalescent homes, schools, colleges, correctional facilities, etc. Institutional users subject to ICR must have costs allocated individually.

E. **Septage**. If septage is received at the treatment works, this category must be listed as a user class with the corresponding flows and loads. The charges established for septage dumpings must be based on its contributing loadings. Generally a 1000 gallon dumping contains 45 lbs of BOD and 100 lbs of suspended solids. Unless other loadings are documentable, these should be utilized.

F. **Water Reclamation**. Beneficiaries of the reclaimed water must be identified for projects involving water reclamation. Beneficiaries may be users of the reclaimed water or indirect beneficiaries, such as potable waters users that benefit by the increase in total water supply. A narrative describing the basis for classifying the types of beneficiaries should be included. A table listing the beneficiaries, the type (direct and indirect), description of benefit, and projected use of the reclaimed water should also be included.

DECLARATION OF SERVICE BY MAIL

(Code of Civil Procedure, §§ 1013(a), 2015.5)

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in San Diego County, California, in which County the within-mentioned mailing occurred, and not a party to the subject cause. My business address is 751 East Rancheros Drive, Suite 2, San Marcos, California 92069. I served the attached:

PETITION FOR REHEARING

by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

See Attachment "A"

Each envelope was then sealed and with the postage thereon full prepaid, deposited in the United States mail by me at San Marcos, California on July 31, 1986.

I declare under penalty of perjury that the foregoing is true and correct: July 31, 1986, San Marcos, California.

/s/ Sharon I. Heafey

Attachment "A"

Clerk, Court of Appeal
Fourth Appellate District
Division One
1350 Front Street, Room 6010
San Diego, California 92101

Lynn R. McDougal, Esq.
McDougal, Meloche, Love & Eckis
460 North Magnolia
Drawer 1466
El Cajon, California 92022-1466

Clerk, San Diego County
San Diego Superior Court
County Courthouse
220 West Broadway
San Diego, California 92101

George Marchand, Esq.
Office of the General Counsel
Regents of the University of California
590 University Hall
Berkeley, California 94720

Honorable F. V. Lopardo
Judge of the Superior Court
North County Branch
325 South Melrose Drive
Vista, California 92083

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Chico, California 94927

B. Richard Marsh
Knapp, Grossman, Marsh & Jones
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Los Angeles, California 90071

Ada Treiger, Esq.
Legal Advisors Office
Los Angeles School District
450 North Grand Avenue, room A337
Los Angeles, California 90012

APPENDIX E

RECEIVED
JUN 17 1986
Clerk Supreme Court

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

L.A. No. 32124
No. D0001951
(Sup. Ct. No. N24145)

SAN MARCOS COUNTY WATER DISTRICT,
Plaintiff and Respondent,

v.

SAN MARCOS UNIFIED SCHOOL DISTRICT
Defendant and Appellant.

RESPONDENT SAN MARCOS COUNTY WATER DISTRICT'S REPLY TO PETITIONER'S SUPPLEMENTARY AUTHORITY SUBMITTED AT ORAL ARGUMENT

SMITH & PELTZER, A.P.C.
VERNON A. PELTZER, Esq.
JEFFREY G. SCOTT, Esq.
Attorneys at Law
751 East Rancheros Drive, Suite 2
San Marcos, California 92069
(619) 744-7125

Attorneys for Plaintiff / Respondent
SAN MARCOS COUNTY
WATER DISTRICT

INTRODUCTION

Pursuant to the permission of the Supreme Court, the SAN MARCOS COUNTY WATER DISTRICT submits this response to Petitioner's (SAN MARCOS UNIFIED SCHOOL DISTRICT) Supplementary Authority filed with the Court *at the time of oral argument*. The Supplementary Authority submitted by the SCHOOL DISTRICT is 67 Ops. Cal. Atty. Gen. 13, (January, 1984).

DISCUSSION

A

THE ATTORNEY GENERAL OPINION IS BASED ON REASONING REJECTED BY THE COURT OF APPEAL AND WAS REACHED WITHOUT THE BENEFIT OF THE ANALYSIS IN THE BRIEFS BEFORE THIS COURT.

The problem with accepting the 1984 Attorney General Opinion, as a means to decision in this case, is that the Attorney General did not have the benefit of the majority opinion (Justice Weiner with Justice Butler concurring) in the case of *San Marcos [County] Water District v. San Marcos Unified School District* (1985) 171 Cal.App.3d 223 which, after critical and detailed analysis, rejected the same reasoning advanced by the Attorney General as contrary to basic tenets of municipal finance, logic, and cases decided by sister states, as well as California precedent. The majority held that a public agency must pay a uniform nondiscriminatory capacity (user-impact) fee, the same as any other user of a public sewer system. Without the benefit of that

Court's reasoning and the briefs submitted to this Court, set in juxtaposition to the authorities cited by the Attorney General, his opinion becomes an uncritical, superficial, repetition of the same, mistaken analysis rejected by the Court of Appeal in the case before this Court. The absence of any perceptive analysis by the Attorney General is stated below.

The issue with respect to the hospital involved in the Attorney General Opinion, and the issue in the case before this Court for a school, is not whether a hospital or school should function, and not whether or not they should function with or without sewer service. It is a fact of life that the efficient operation of the educational system, the efficient operation of hospitals, and the efficient operation of a sewer system are essential to modern society.

Further, the question is not who is going to pay the sewer bill. The ultimate payor is the public who pays a variety of taxes, assessments, and *fees* to finance government operations and facilities. The ultimate question is how the money to finance these facilities is channeled and accounted for.

The SCHOOL DISTRICT and the Attorney General are advocating a basic proposition that the schools and the hospital will pay for all on-site sewer facilities, the kitchens, the cafeterias, the bathrooms, the laboratories, and other waste-generating facilities, and will collect and channel that waste into the public sewer system, and at that point there is absolutely no responsibility for further payment for the cost of sewage disposal, that cost is to be shifted to the unfortunate other customers of the sewering agency who happen to live in the same area with that facility and use the same sewer system. Thus, the true cost of operating the hospital, or school, or university (or prison) is concealed

from the public and this burden is unfairly shifted to these other, unfortunate citizens.

It is of no consequence to the Attorney General or to the SCHOOL DISTRICT that some or all of the people who use the university, or the school, or the hospital (or a prison) contribute nothing to pay for that cost. It is axiomatic that someone must bear the cost. For the Attorney General and the SCHOOL DISTRICT that is a cost that must be borne by other local sewer users.

That proposition is devoid of any basis in logic or reason. The classification of payors without a fair substantial basis violates the Constitutional principle of Equal Protection. *Haman v. County of Humboldt* (1973) 8 Cal.3d 922 [cited in SCHOOL DISTRICT Reply Brief, p. 4].

The Federal cases also cited by SCHOOL DISTRICT (Reply Brief, p. 4) require application of "equal protection" to the *taxing* power even though the latitude of Federalism applies to the Federal-State relation.

In any event, that shift of cost burden is not permitted by the Federal Constitution; the government must pay for the benefit *taken and used. United State of America v. 129.4 Acres of Land and Yuma Mesa Irrigation Drainage District* (9th Cir. 1986) 86 Daily Journal DAR 1582. Under California law, a taking by one public entity of the property of another public agency is a condemnation regulated by statute. *CCP § 1240.610 et seq.* The statute provides for compatible use by public agencies. *CCP § 1240.510.* Payment is required. *CCP § 1255.010, et seq.; § 1263.010, et seq.* A failure to follow proper procedures (more necessary public use) is fatal to the eminent domain action. *Pacific Gas & Electric Co. v. Superior Court of Trinity County; Hayfork Valley Public Utility District* (1986) 180 Cal.App.3d 770.

The WATER DISTRICT, on the other hand, contends that if a prison, school, university, or hospital is located in the sewering agency's service area *and uses the sewer system*, the funds to pay for that sewer capacity, though those funds ultimately come from the public, must come through sources of funds available to that using agency (the school, the university, the hospital, the prison). In short, the user must pay for the capacity committed to that user. This is consistent with equal protection and avoids taking without paying — inverse condemnation (confiscation). City of Los Angeles Brief, pp. 16-17.

The cited Opinion of the Attorney General does not define the issue as stated above and as presented to this Court, but merely repeats the fallacies of the precedent relied upon to reach the decision.

The illogic of the Attorney General Opinion is demonstrated by the attempt to salvage the prior Opinion in 19 Ops. Cal. Atty. Gen. 195, 197 (1952), cited at 67 Ops. Cal. Atty. Gen. at 14, in which the Attorney General stated that it was permissible to require a School District to pay a uniform sewer service charge based on the extent or nature of the use made of the facilities. To read that 1952 Attorney General Opinion in conjunction with the 1984 Attorney General Opinion (the latter being relied upon by the SCHOOL DISTRICT DISTRICT) reveals that the Attorney General is saying that if you impose a capacity fee but don't tell anyone what costs the capacity fee will be used to pay, that is permissible (1952 Opinion), but if you tell everyone that you are going to use it for the payment of capital facilities (a cost for the volume of the sewage disposal system committed to the user), then it is not permissible because it is a violation of the *County of Riverside* case and *Regents I* and *Regents II*, all of which

were rejected by the Court of Appeal in the case before this Court for decision.

The Attorney General opines that the basis for this exemption of a public agency is the concept that sovereign powers may not be impaired. 1984 Opinion, Vol. 67 at 15, referring to *tax* and assessment proceeding and 65 Ops. Cal. Atty. Gen. 267 (1982), *a tax* collection issue. The historical basis for a tax or assessment exemption is the prohibition against enforcing a lien on public property (selling the property to enforce the lien). Amicus Chico Brief, pp. 11-14. That rational has no application to a sewer (user-impact) capacity fee. *Ibid*, pp. 13-14. A public agency is not subject to a mechanic's *lien*. *Ibid*, pp. 12-13. But a public agency does not get the benefit for free; a "*stop notice*" is used to extract payment, not a lien. *CCP §§ 3179-3214. The stop notice does not become a lien merely by serving the same purpose — to enforce payment*; a demonstration that the fallacious "purpose" test is not accepted by drafters of comprehensive legislation or the Legislature.

It follows that there is no *impairment* of the sovereign power in a user fee; the use is voluntary; merely payment for capacity received. There is no regulation (interference) with the user. Use of the public sewer system benefits the school, hospital, university or prison; it does not impair the function. The user receives a bargain. The SCHOOL DISTRICT knows this; it makes no offer or effort to build its own sewer system, as authorized by the Education Code. There is an exclusion for taxed or assessments *only* if there is an impairment of sovereign powers. 65 Ops. Cal. Atty. Gen. at 272-273 (and cases cited). There are no taxes or assessments before this Court. The fee is paid voluntarily; it is paid at the time of use of the property, it is measured by the use impact on the committed volume (not by value

benefit to the land); it is not a lien (burden) on the land. It is not imposed without regard to use, it is collected from the user. City of Los Angeles Brief, pp. 5-16; ACWA Brief, pp. 6-11, 14-29; Chico Brief, pp. 4-9, 15-17; WATER DISTRICT Brief, pp. 6-21. There is no impairment, only benefit (less cost), for the SCHOOL DISTRICT in using the public sewer system.

It is an understatement to characterize the reasoning of the 1984 Opinion as unique. It deserves the ultimate in satire by Professor Irving Younger, as explained during oral argument, condemning reasoning by false analogy rather than probing to find the essence of the problem involved. The 1984 Opinion does not follow the prior 1952 and 1982 Opinions and does not perceive the true facts and issues involved.

The *false analogy* involved in the "purpose test" adopted by the Attorney General was discussed during oral argument. That is the test relied upon by the Attorney General (derived from the *Regents*' decisions). The reasons for rejecting that test were set forth in the oral argument and in the briefs of the WATER DISTRICT, pp. 47-50, Amicus ACWA, p. 19, line 12, p. 34, line 37. A user fee is not a tax or assessment. If the purpose test is adopted, this Court will wipe out the history, tradition, and acceptance of user fees as a basis of municipal finance, and will stand alone unsupported by any comparable law in sister states as pointed out by the Court of Appeal in this case.

B

THE LEGISLATURE HAS STATED THAT THE SCHOOL DISTRICT MUST PAY SEWER CAPACITY FEES AND ANY *CONSTITUTIONALLY PERMISSIBLE* CHANGE MUST COME FROM THE LEGISLATURE.

Whatever may be the relationship between a sanitary district and a hospital involved in the Attorney General Opinion, that relationship has nothing to do with the relationship between a County Water District and a School District, the former being governed by the Health and Safety Code and the Water Code, and the latter being governed by the Education Code.

The 1984 Attorney General Opinion does not purport to discuss the Enabling Act of the hospital concerned or the sewering agency concerned, and obviously it does not discuss the provisions of the Education Code and the Legislative History applicable to the SCHOOL DISTRICT which is a party to this case. The Opinion ignores the law of contract or lease rights in the property of another.

The Education Code and the Legislative History clearly state that the public SCHOOL DISTRICT must either construct its own sewer system or acquire rights in a sewer system constructed or to be constructed by others. WATER DISTRICT Brief, pp. 26, et seq. One acquires rights in property belonging to another by contract (or by lease). *Ibid*, p. 30 [*arrange for disposal of sewage by contract; pay share of disposal cost*]. Originally the funding source was the building [a capital] fund; later other fund sources in

addition to the building fund could be used. *Ibid*, p. 29 and p. 31.

When the SCHOOL DISTRICT pays capacity fees it acquires a contract or lease right in the WATER DISTRICT's sewer system obligating the WATER DISTRICT to provide a certain volume of sewage disposal capacity to the SCHOOL — the volume paid for by the sewer (user-impact) fee. To state that the SCHOOL DISTRICT has no rights in the WATER DISTRICT's sewer system because there is no ownership (as Justice Staniforth claimed and as the SCHOOL DISTRICT claims in this case) is to erase from law the concept of contract or lease rights in another person's property.

The majority of the Court of Appeal was not prepared to make such a radical change in contract or lease law, and this Court should not undertake to perform such radical surgery on the law of California by wiping out the concept of user fees for municipal financing and contract and lease rights in property belonging to another (as advocated by the SCHOOL DISTRICT in this case and as ignored by the Attorney General in the 1984 Opinion).

CONCLUSION

For the reasons set forth above, the cited Attorney General Opinion should not be followed. It obviously does not consider the perceptive, detailed analysis and reasoning which has been provided to this Court through the Trial Court and Appellate Court decisions and the briefs of the WATER DISTRICT and Amici ACWA, Chico, and the City of Los Angeles.

Respectfully submitted,
SMITH & PELTZER, A.P.C.
Attorneys for the
SAN MARCOS COUNTY WATER DISTRICT

By /s/ Jeffrey G. Scott
for VERNON A. PELTZER

DECLARATION OF SERVICE BY MAIL
(Code of Civil Procedure, §§ 1013(a), 2015.5)

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in San Diego County, California, in which County the within-mentioned mailing occurred, and not a party to the subject cause. My business address is 751 East Rancheros Drive, Suite 2, San Marcos, California 92069. I served the attached:

RESPONDENT SAN MARCOS COUNTY WATER DISTRICT'S REPLY TO PETITIONER'S SUPPLEMENTARY AUTHORITY SUBMITTED AT ORAL ARGUMENT

by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

See Attachment "A"

Each envelope was then sealed and with the postage thereon full prepaid, deposited in the United States mail by me at San Marcos, California on June 17, 1986.

I declare under penalty of perjury that the foregoing is true and correct: June 17, 1986, San Marcos, California.

/s/ Sharon I. Heafey

Attachment "A"

Clerk, Court of Appeal
Fourth Appellate District
Division One
1350 Front Street, Room 6010
San Diego, California 92101

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Clerk, San Diego County
San Diego Superior Court
County Courthouse
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San Diego, California 92101

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Regents of the University of California
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Honorable F. V. Lopardo
Judge of the Superior Court
North County Branch
325 South Melrose Drive
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515 South Figueroa Street
Los Angeles, California 90071

APPENDIX F

ORDER DUE
September 19, 1986

SUPREME COURT
FILED
AUG 28 1986
Laurence P. Gill, Clerk
Deputy

ORDER DENYING REHEARING

LA No. 32134

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SAN MARCOS WATER DISTRICT,
Respondent

v.

SAN MARCOS UNIFIED SCHOOL DISTRICT,
Appellant

Respondent's petition for rehearing DENIED.

/s/ BIRD
Chief Justice

APPENDIX G

RECEIVED
NOV 18 1982
CALENDAR
CLERK

SMITH & PELTZER, A.P.C.
Attorneys at Law
751 E. Rancheros Drive, Suite 2
Vista, California 92083
(619) 744-7125

IN THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO
NORTH COUNTY JUDICIAL DISTRICT

In the matter of the Agreed Case Between

SAN MARCOS COUNTY WATER DISTRICT,
Plaintiff,

and

SAN MARCOS UNIFIED SCHOOL DISTRICT,
Defendant.

No. N24145
AGREED CASE
[CCP § 1138]
SEWER CAPACITY FEES

DATE: 1-13-84
TIME: 9:30 a.m.
PLACE: A

Plaintiff, SAN MARCOS COUNTY WATER DISTRICT and Defendant, SAN MARCOS UNIFIED SCHOOL DISTRICT, parties to the following question in difference which might be the subject of a civil action, hereby agree on the following facts concerning such question to be submitted to the proper jurisdiction of this court for its determination and judgment as provided for in Code of Civil Procedure §1138.

1. SAN MARCOS COUNTY WATER DISTRICT is a public agency organized and existing under the COUNTY WATER DISTRICT LAW, California Water Code §30000 et seq. SAN MARCOS COUNTY WATER DISTRICT [WATER DISTRICT] is situated in the North County Judicial District and provides water and sewer service within the territory encompassed within the boundaries of the WATER DISTRICT.

2. The SAN MARCOS UNIFIED SCHOOL DISTRICT [SCHOOL DISTRICT] is a public agency providing educational services in the North County Judicial District, County of San Diego, State of California and is organized and exists pursuant to Education Code §35500, et seq.

3. The relative service areas of the SCHOOL DISTRICT and the WATER DISTRICT are depicted on the map attached hereto and incorporated herein as Exhibit "A". As depicted on the map the territory of SCHOOL DISTRICT is larger and encompasses more area than the sewer service area of WATER DISTRICT. Therefore SCHOOL DISTRICT's territory (educational responsibility) exceeds WATER DISTRICT's sewer service area, although all currently used school sites are within the WATER DISTRICT's sewer service area. The SCHOOL DISTRICT owns approximately 131.33 acres of property: 4.94 acres of the property is not located in the WATER DISTRICT, and approximately 9.87 acres, located on Knob Hill, is within the WATER DISTRICT, but is not being used for school purposes. A total of 113.52 acres of property is located within the WATER DISTRICT and used for school purposes.

4. In 1975 and in years subsequent thereto predecessors of SCHOOL DISTRICT applied to WATER DISTRICT for sewer service to serve the facilities of SCHOOL DISTRICT. Exemplary applications for sewer service are set forth in Exhibits "B-1", "B-2", "B-3", and "B-4" attached hereto and incorporated herein.

5. The rules and regulations for providing sewer service to schools at all times germane to the present dispute are set forth in WATER DISTRICT Ordinances No. 47, 47-1, 47-5, 47-6, 65 and WATER DISTRICT Resolution No. 653 copies of which are attached hereto and incorporated herein as Exhibits "C-1", "C-2", "C- 3", "C-4", "C-5" and "C-6".

6. The dispute between WATER DISTRICT and SCHOOL DISTRICT relates to the obligation of the SCHOOL DISTRICT to pay sewer capacity right fees (hereinafter "capacity fees") in accordance with WATER DISTRICT Rules and Regulations. The SCHOOL DISTRICT asserts an exemption from the obligation to pay capacity fees; WATER DISTRICT asserts that the SCHOOL DISTRICT is obligated to pay capacity fees in accordance with DISTRICT Ordinances and resolutions so long as SCHOOL DISTRICT utilizes sewer facilities and services of WATER DISTRICT.

7. From time to time since the imposition of the fees, discussions were held between the SCHOOL DISTRICT'S various superintendents and administrative personnel and members of the Board of the WATER DISTRICT wherein the SCHOOL DISTRICT complained about the imposition of the fees. The WATER DISTRICT consistently maintained that the SCHOOL DISTRICT had entered into an enforceable contract for water service and therefore owed the fees. From 1971 the SCHOOL DISTRICT and

the SCHOOL DISTRICT'S predecessor paid capacity fees pursuant to the applications filed for connection to the WATER DISTRICT'S sewer system in the amounts listed below.

NAME	INVOICE NUMBER	DATE	DUE NUMBER	AMOUNT
Richland School	2564	10-27-71	3	900.00
San Marcos High School	2565	10-27-71	3	600.00
Alvin Dunn School	2756	11-22-72	2	600.00
Richland School	2756	11-22-72	4	1,200.00
San Marcos School	2756	11-22-72	1	300.00
San Marcos Jr. High	2756	11-22-72	2	600.00
San Marcos High School	2759	11-22-72	2	600.00
Alvin Dunn School	3237	12-3-73	3	900.00
Richland School	3237	12-3-73	4	1,200.00
San Marcos School	3237	12-3-73	3	900.00
San Marcos High School	3238	12-3-73	5	1,500.00
Richland School	3770	1-6-75	6	1,800.00
San Marcos School	3770	1-6-75	6	1,800.00
San Marcos Jr. High	3770	1-6-75	4	1,200.00
San Marcos High School	3771	1-6-75	2	600.00
San Marcos Jr. High	4077	11-25-75	2	1,000.00
Woodland Park School	4077	11-25-75	6	3,000.00
San Marcos High School	4078	11-25-75	3	1,500.00
San Marcos Jr. High	4486	12-8-76	1	500.00
Woodland Park School	4486	12-8-76	5	2,500.00
San Marcos High School	4486	12-8-76	3	1,500.00
District Office	4486	12-8-76	2	1,000.00
San Marcos Jr. High	4957	11-16-77	3	3,000.00
Woodland Park School	4957	11-16-77	3	3,000.00
San Marcos High School	4957	11-16-77	4	4,000.00
San Marcos School District	6344	12-18-79	13	24,050.00
		TOTAL		$59,750.00

8. In 1981 and subsequent thereto, SCHOOL DISTRICT refused to pay said fees and asserted an exemption from this obligation notwithstanding that invoices were filed with the SCHOOL DISTRICT for payment, copies of which are attached hereto as Exhibits "D-1" (March 5, 1981), "D-2" (November 12, 1981) and "D-3" (November 17, 1982). The amounts plus interest at 7% per annum which the WATER DISTRICT contends are due as of May 31, 1983 and which the SCHOOL DISTRICT denies are due are as follows:

	PRINCIPAL	INTEREST
March 5, 1981	$19,200.00	$3,016.24
Nov. 12, 1981	16,800.00	1,833.27
Nov. 17, 1982	9,600.00	366.25
	$45,600.00	$5,216.03

9. There is no dispute between the parties with respect to SCHOOL DISTRICT's obligation to pay fees and costs (labor and materials) for the physical connection of a school facility to the WATER DISTRICT's sewer system and there is no dispute that the SCHOOL DISTRICT is obligated to pay the monthly service charges for sewer service. The disagreement between the parties relates solely to the obligation of the SCHOOL DISTRICT to pay capacity fees; the WATER DISTRICT contending that the SCHOOL DISTRICT is obligated to pay that fee and SCHOOL DISTRICT contending that the SCHOOL DISTRICT is exempt from any such fee.

10. The money collected by WATER DISTRICT from capacity fees is calculated according to the formula set out in Ordinance No. 47-5 [Exhibit "C-3"]. Capacity fees are calculated based upon the number of dwelling unit

equivalents [DUE], which are defined as waste flow up to 250 gallons per day. The fees for schools is $2,400.00 per DUE, one DUE equals ". . . 25 students, faculty and administrators, et cetera. . .". There is an annual review during the third week of October of each year to determine the census and the amount of capacity fees then due and payable for an increase in the census over previous years.

11. WATER DISTRICT is a member (with other governmental entities) of the Encina Water Polution Control Facility which treats water sewage to meet the standards for, and preparatory to, discharge through an ocean outfall into the Pacific Ocean. A current enlargement of that plant, to which the DISTRICT is obligated to contribute a share of the plant expansion, is underway. When completed, Encina will have an approximate value of $52 million dollars and WATER DISTRICT's ownership will be approximately $9 millior dollars. In addition WATER DISTRICT is in the process of rehabilitating the DISTRICT's Meadowlark Plant for purposes of treatment of sewage and potential discharge into the ocean through a land and ocean outfall or for use of the reclaimed water on land and the DISTRICT's investment in that facility, which is presently under enlargement, will be approxamately $7 million dollars.

12. As indicated in Ordinance 47-5 [Exhibit "C-3"] the capacity fee revenue is used in accordance with §5471 of the Health and Safety Code:

> ". . . only for the acquisition, construction, reconstruction, maintenance and operation of sanitation and sewage facilities, to repay principal and interest on bonds issued for the construction or reconstruction of such sanitation or sewage facilites and to repay Federal or State loans or

advances made to the entities for the construction or reconstruction of sanitation or sewage facilities; provided, however, that such revenue shall not be used for the acquisition or construction of new local streets sewers or laterals as distinguised from main trunk, interceptor, and outfall sewers."

13. As set forth in Section 5 of Ordinance No. 47-5 the WATER DISTRICT reserves the right to discontinue any and all service in the event of failure to pay the whole or any part of the fees, without prejudice to any other remedy which the DISTRICT may have.

14. The question submitted for the Court's determination is whether the capacity fee is a valid charge payable by the SCHOOL DISTRICT. It is the SCHOOL DISTRICT'S contention that: (1) The capacity fee is a special assessment because it is used to fund capital improvements; (2) The SCHOOL DISTRICT is exempt from paying special assessments unless the Legislature directs otherwise; (3) The Legislature has not directed otherwise.

It is the WATER DISTRICT'S contention that: (1) When the SCHOOL DISTRICT connected to the sewer system in 1971, the parties entered into a contract whereby, in return for the WATER DISTRICT'S providing sewer service, the SCHOOL DISTRICT promised to pay for said service according to WATER DISTRICT'S rules and regulations; (2) The sewer fee is not an assessment because it is not imposed involuntarily; (3) Education Code §39002, §39606 and especially §39613 authorize the SCHOOL DISTRICT to enter into a contract for the treatment and disposal of their sewage with the WATER DISTRICT and provides legislative authority for payment by the SCHOOL DISTRICT of the special assessment, if this fee can be called a special assessment; (4) Water Code §31101.5,

effective January 1, 1983 (Assembly Bill No. 3639) provides legislative authority for the Water District to charge the School District for capacity fees.

WHEREFORE, the parties pray for a determination by the Court with respect to:

1. The SCHOOL DISTRICT'S obligation to pay capacity fees billed but unpaid.

2. The SCHOOL DSITRICT'S obligation to pay capacity fees after January 1, 1983, the effective date of Water Code §31101.5.

3. The WATER DISTRICT'S obligation to reimburse the SCHOOL DISTRICT for fees paid since 1971.

4. The amount of interest owing on either party's obligation to the other.

DATED: 10-3-83 /s/
PLAINTIFF

DATED: 10-4-83 /s/
ATTORNEY FOR PLAINTIFF

DATED: 9-28-83 /s/
DEFENDANT

DATED: 9-30-83 /s/
ATTORNEY FOR
DEFENDANT

Supreme Court, U.S.
FILED
JAN 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-892 (2)

In The
Supreme Court of the United States
October Term, 1986

SAN MARCOS COUNTY WATER DISTRICT,
Petitioner,

vs.

SAN MARCOS UNIFIED SCHOOL DISTRICT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 86-892

In The

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October Term, 1986

SAN MARCOS COUNTY WATER DISTRICT,

Petitioner,

vs.

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Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent San Marcos Unified School District respectfully prays that this Court deny the San Marcos County Water District's petition for a writ of certiorari to review the decision of the California Supreme Court which held that sewer capacity fees are special assessments

from which public entities such as Respondent San Marcos Unified School District are impliedly exempt.

STATEMENT OF THE CASE

Petitioner San Marcos County Water District (hereinafter referred to as "Water District") is a public agency which provides water and sewer services within the North County Judicial District of San Diego County, California, and is organized and exists pursuant to California Water Code §§ 30000-33249, commonly known as the County Water District Law. Respondent San Marcos Unified School District (hereinafter referred to as "School District") is a public agency which provides educational services in the North County Judicial District of San Diego County and is organized and exists pursuant to Chapter 3 of Division 2 of Title 2 of the California Education Code, §§ 35500 *et seq.* School District's territory exceeds Water District's territorial boundaries, although all of School District's currently used school sites are within Water District's territory.

In 1971 and in subsequent years, predecessors of School District applied to Water District for sewer service to serve School District's facilities. Water District has charged School District connection fees and monthly sewer service charges. School District does not deny its obligation to pay such fees and charges and has paid them and will continue to do so. There is no issue as to the connection fees and monthly service charges.

On the other hand, there was a dispute about School District's obligation to pay the capacity fees Water District has imposed. From time to time since the imposition of the fees, discussions were held between School District's various superintendents and administrative personnel and member of Water District's Board wherein School District complained about the imposition of the capacity fees. Between 1971 and 1981, School District paid the capacity fees under protest. Since 1981, School District has refused to pay the capacity fees, asserting that it is exempt from the assessment of the fees.

The capacity fees are based upon a charge for each "dwelling unit equivalent," which is defined as waste flow up to 250 gallons per day. The fee for schools is $2,400.00 per dwelling unit equivalent, one dwelling unit equivalent equalling ". . . 25 students, faculty, and administrators, et cetera. . . ."

There is a review during the third week of October of every year to determine the census and the amount of capacity fees then due and payable for an increase in the census over the previous years. In fact, however, at no stage in this matter has Water District ever presented any proof to substantiate its claim that School District's use of the sewer facilities has created any need for additional capacity.

This matter was commenced upon the filing of an Agreed Case on November 15, 1983, pursuant to California Code of Civil Procedure § 1138. Basically, the Agreed Case stipulated that the dispute between Water District and School District centered on the legality of Water District's assessment of sewer capacity fees (hereinafter "ca-

pacity fees''). (*See* Paragraphs 6 and 14 of Appendix G of the Petition for Writ of Certiorari).

After briefs were filed and argument was heard, the trial court found that School District had entered into a contract with Water District and was obligated to pay the capacity fees; that California Education Code § 39613 authorized School District to enter into the contract; and that California Water Code § 31101.5, which was effective on January 1, 1983, authorized the assessment of the capacity fees after that date. (*See* Appendix C of the Petition for Writ of Certiorari).

School District's subsequent motions for new trial or to vacate and set aside the judgment and reopen for further proceedings were denied. School District appealed to Division One of the Fourth District Court of Appeal. On August 19, 1985, the appellate court filed its opinion, which affirmed the trial court's decision but did not follow its reasoning. In fact, the appellate court discussed economic theory and relied upon out-of-state case law to support its affirmance. It found that the capacity fee imposed by Water District was a valid ''user charge'' and not an invalid assessment. (*See* Appendix B of the Petition for Writ of Certiorari).

The opinion of the Court of Appeal was in direct conflict with precedent established by at least three other published California appellate opinions. The appellate court's total and explicit deviation from California law rendered review of the matter by the California Supreme Court necessary and desirable. School District petitioned the California Supreme Court to review the matter and re-

solve the conflict among the lower appellate courts, and it agreed to do so.

The California Supreme Court reversed the judgment of the trial court and the decision of the intermediate appellate court. It held that the capacity fee is a special assessment in substance and effect and that School District is impliedly exempt from paying special assessments. Contrary to Water District's assertion, the California Supreme Court's remark about payment of the entire cost of capital improvements by private customers was not a part of its rationale, much less its holding.

Water District did not present its purported federal or state constitutional objections until several days after the California Supreme Court filed its opinion, which was not favorable to Water District. Contrary to Water District's assertion, the points in Water District's petition for a rehearing could have been presented at the time of the first appeal as further reasons for the appellate court to uphold the trial court's ruling. Those points could have been considered in the proceedings below, but Water District failed to raise them.

The petition for rehearing was denied without comment. The California Supreme Court generally does not grant a petition for rehearing which attempts to discuss the case on points which were not discussed in the briefs or raised in oral argument before it.

Very shortly before the expiration of the period within which a petition for a writ of certiorari could be filed, Water District filed and served the instant petition, requesting that "the misdirection of the California Supreme Court be righted." Respondent School District's position

is that the matter has been properly adjudicated in all respects and that the Fourth District Court of Appeal, to which the matter was remanded for a determination of whether the School District is entitled to a refund of the fees it has paid, should proceed with that determination.

ARGUMENT

I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A.

WATER DISTRICT'S CONSTITUTIONAL ARGUMENTS ARE UNTIMELY.

As stated above, Water District failed to present any state or federal constitutional issues until *after* the California Supreme Court had filed its opinion, although there was no prohibition, restraint or disability which precluded Water District from raising such issues as early as the proceedings in the trial court. The proposition that a federal question is raised too late if it is not presented *prior* to the decision of the state court of last resort is well settled. *Spies v. Illinois,* 123 U.S. 131 (1887); *Sayward v. Denny,* 158 U.S. 180 (1895); *Citizens' Sav. Bank v. Owensboro,* 173 U.S. 636 (1899). Failure to raise the issue of whether regulations governing the use of school property for non-school purposes were unconstitutionally vague in the state court proceedings was fatal to raising the issue on petition for writ of certiorari. *Ellis v. Dixon,* 349 U.S. 458, *reh'g denied,* 350 U.S. 855 (1955). As recently as

1969, the United States Supreme Court stated that it will not decide federal constitutional issues raised for the first time on review of state court decisions. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). This pronouncement is in accord with *Missouri etc. R. Co. v. Sealy*, 248 U.S. 363 (1919), where the court stated that it will not consider a federal question presented too late for a state court's consideration. Generally, presenting constitutional questions for the first time in a petition for a rehearing to a state court of last resort is too late. *See*, e.g., *Montana v. Rice*, 204 U.S. 291 (1907).

Furthermore, this court has repeatedly indicated that a federal right must be asserted in *and passed upon by* the state court in order for the federal Supreme Court to review a claim that the right was denied. *See Louisville, etc. R. Co. v. Woodford*, 234 U.S. 46 (1914); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291 (1903); *Chemical Nat. Bank v. City Bank*, 160 U.S. 646 (1896). Water District utterly failed to assert any federal rights at the state trial court level or at any time until several days *after* the filing of California Supreme Court's opinion. It then presented arguments based on the rights of third persons, who had not suffered any harm and who were in no need of a spokesperson. The California Supreme Court did not address these belatedly raised issues. They are not properly before this court. Water District's last-ditch effort to avert an unfavorable judicial decision does not merit the court's consideration.

B.

THE CALIFORNIA SUPREME COURT'S DECISION ADDRESSED ONLY MATTERS OF STATE OR LOCAL CONCERN AND WAS BASED ON STATE LAW.

As explained above, the preliminary issue in this case was whether sewer capacity fees are special assessments under California law. The parties were two local public entities. The other key issue in the case was whether School District had any payment obligation with respect to such fees. The determination of that issue depended upon the outcome of the primary issue. No federal constitutional rights were in question. Thus, the dispute was one of local, not national, significance.

Resolution of the issues depended on the interpretation and application of California, not federal, law to the facts of the matter. At no time was the constitutionality of any California statute ever in question. Even a cursory reading of the California Supreme Court's opinion reveals that it is based solely on California law. In deciding this matter, there was no call or necessity for discussing or interpreting any portion of the Constitution of the United States or any federal statute, and the California Supreme Court properly refrained from doing so. The dispute was a matter of state law only, and the California Supreme Court resolved the dispute before it according to California law. The court was not called upon to decide any issues about federal constitutional rights and did not do so.

It has long been accepted that the United States Supreme Court will not review a state court's judgment if that judgment rests on an adequate state ground. *Hammerstein v. Superior Court of California in and for Los*

Angeles County, 340 U.S. 622 (1951). This is true even if there were federal grounds for the judgment. *Fay v. Noia,* 372 U.S. 391 (1963). In the matter at bench, the judgment is based only on California law, the validity of which is not in question. Thus, there are adequate state grounds for the judgment, and federal grounds are absent.

A state court's decision which is based on local law and does not involve constitutional questions is not reviewable in the United States Supreme Court. *Hartford Life Ins. Co. v. Blincoe,* 255 U.S. 129 (1921); *Hibben v. Smith,* 191 U.S. 310 (1903). That is precisely the type of judgment involved here, and it should be allowed to stand. The federal Supreme Court should not review a judgment involving local law (provisions of the California Constitution, the California Education and Water Codes and California decisional law) as applied by local courts to resolve local issues. *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667 (1950). State sovereignty over local taxation matters should be respected.

C.

THERE IS NO QUESTION OF FEDERAL LAW.

Although filing a petition for a writ of certiorari is a correct procedure for seeking Supreme Court review of a state court decision which an aggrieved party perceives as violating a federal constitutional right, privilege or immunity, the granting of the petition is a matter of the court's discretion, which is exercised "only when there are special and important reasons." 28 U.S.C.A. § 1257 (3); U.S. Sup. Ct. Rule 17.1, 28 U.S.C.A. Rule 17.1 sets forth three instances which usually call for granting a petition for writ of certiorari. Although the list is not all-

inclusive, the matter at bench does not fall within any of the categories.

For one thing, throughout the proceedings below, the validity and constitutionality of the California statutes relied upon by both parties were never challenged. No federal laws were invoked by either party. In addition, until it filed the Petition for Rehearing, Water District failed to present its constitutionally-based arguments. Since such arguments were not made in a timely fashion, the California Supreme Court did not address them. As a general rule, the California Supreme Court does not grant a petition for rehearing which attempts to discuss the case on points which were not discussed in the briefs or raised in oral argument before it. *See San Francisco v. Pacific Bank*, 89 Cal. 23, 25, 26 P. 615 (1891).

The decision of the California Supreme Court resulted from the reasoned interpretation of California law. No questions of federal law were considered, much less involved in this case. The California Supreme Court properly restricted its review to the actual controversy before it, namely, whether sewer capacity fees are special assessments. That is an issue having only state-wide significance. To say that the California Supreme Court failed to exercise judicial restraint to avoid constitutional issues is absurd.

Although the absence of a federal question does not mean automatic denial of a petition for a writ of certiorari, it is a highly significant factor which, either alone or taken in conjunction with Water District's lack of standing should convince this court to deny Water District's petition.

D.

WATER DISTRICT LACKS STANDING.

One of the major jurisdictional barriers which Water District has failed to surmount in this challenge to the California Supreme Court's decision is its lack of standing to seek review of the decision on the grounds stated in the petition. Water District claims that the decision "mandates" violations of the Takings Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. While School District strongly disagrees with these claims, there is a threshold obstacle which prevents this court from addressing the positions of the parties: The constitutional rights which might allegedly be violated are not Water District's, nor do the rights belong to anyone under whom Water District is entitled to claim. Generally, a party seeking review must show that enforcement of a judgment would deprive it, not another, of rights arising under the federal Constitution. *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op Marketing Ass'n.*, 276 U.S. 71 (1928).

There is well-established precedent for the proposition that a party is not entitled to review of a decision concerning a title, right, privilege or immunity which was not asserted by that party for itself in the proceedings below or which belongs to a third person under whom the party does not claim. *See*, e.g., *Strader v. Baldwin*, 50 U.S. 261 (1850); *Manning v. French*, 133 U.S. 186 (1890); *Owings v. Norwood*, 9 U.S. 344 (1809); *Miller v. Lancaster Nat. Bank*, 106 U.S. 542 (1883). Water District did not assert its own Fifth or Fourteenth Amendment rights at any stage of the proceedings below, nor does it do so in the in-

stant petition. The constitutional rights of Water District's private customers are rights of third persons under whom Water District is not entitled to claim. The rights of these third persons are not available as a basis for Water District's challenge to the California Supreme Court's decision.

In its discussion of the purportedly mandated violation of the Takings Clause of the Fifth Amendment, the Water District does not claim that its own rights are threatened. At the beginning and the end of Point II of the Petition, Water District emphasizes that its private customers, who are third persons, may be deprived of their Fifth Amendment right (Petition, pp. 10, 15). This reliance on third persons' rights is impermissible and cannot support Water District's petition.

When one reads Water District's argument about the purportedly mandated violation of the Equal Protection Clause of the Fourteenth Amendment, it quickly becomes apparent that Water District is not asserting its own rights but is again mistakenly relying on rights of third persons under whom it is not entitled to claim. It is widely recognized that, in order to have standing to assert a claim of unequal or discriminatory treatment under the Fourteenth Amendment's Equal Protection Clause, one must be a member of the class allegedly prejudiced. *Lague, Inc. v. State,* 136 Vt. 413, 392 A.2d 942 (1978); *State v. Bergun,* 56 Ohio St.2d 354, 10 Ohio Op.3d 485, 384 N.E.2d 255 (1978). Petitioner herein is not a private customer of itself and, thus, is not a member of the class which is allegedly threatened.

Water District cannot base its request for a review of the California Supreme Court's decision on the allegedly threatened rights of third persons.

E.

THERE HAS BEEN NO VIOLATION OF CONSTITUTIONAL RIGHTS REQUIRING REDRESS.

As shown above, Water District has not asserted that any constitutional rights of its own have been violated in any way as a result of the decision under attack. Water District has not suffered any direct or indirect constitutional harm. Since there is no harm or injury of a constitutional nature to be redressed by judicial review, the decision does not merit this court's attention.

Furthermore, contrary to Water District's assertion, the constitutional rights of third persons have not been violated. Such rights were never the subject matter of this lawsuit and thus, were never adjudicated. The purportedly "mandated" violations are purely a matter of Water District's opinion, based on dictum, and were merely the only means available for framing the instant petition.

Assuming, *arguendo*, that third persons have suffered constitutional harm from the California Supreme Court's decision, there is nothing to prohibit such persons from speaking for themselves and directly seeking redress of the wrong done to them. They do not require a representative or spokesperson, which is the role Water District has apparently assumed in order to be able to present its petition. However, as demonstrated above, it is impermissible for Water District to base its challenge to the California Supreme Court's decision on the rights of third persons. Even more fundamental is the absence of any actual, demonstrable violation of anyone's constitutional rights. Without a wrong, there cannot be a remedy. Thus,

judicial review by this court of the California Supreme Court's decision is inappropriate.

II

THE CALIFORNIA SUPREME COURT RESOLVED THE DISPUTE BEFORE IT IN ACCORDANCE WITH ACCEPTED PRINCIPLES.

Water District contends that in resolving the limited issues presented by this matter, the California Supreme Court failed to interpret legislation in a manner that avoided constitutional questions. At first blush, a purported violation of a cardinal principle seems to be a convincing reason for granting Water District's Petition. However, the claim fails to withstand scrutiny. Water District has chosen to ignore certain points which demonstrate the weakness of Water District's position.

First of all, with respect to the primary issue, the nature of the capacity fees, the conclusion that such fees are special assessments rests primarily on the evaluation and application of precedent in the form of California judicial decisions, *not* statutory construction (pp. A-6 through A-13, Appendix A of the Petition for Writ of Certiorari). Public entities, such as School District, are impliedly exempt from special assessments as a result of a 1929 California Supreme Court decision which has not been overruled legislatively or otherwise. *Inglewood v. County of Los Angeles,* 207 Cal. 697 (1929). Water District has not challenged the constitutionality of such implied exemptions.

Water District, realizing that the capacity fees could be found to constitute special assessments, argued that there was *express* legislative authority for requiring School District to pay the capacity fees. Such an argument re-

quired the California Supreme Court to examine the statutes upon which Water District relied. No issue was raised about ambiguous language. The California Supreme Court concluded that the statutes did *not* expressly authorize special assessments against School District. In the absence of express authorization, the California Supreme Court upheld the policy of preventing one tax-supported entity from siphoning tax money from another such entity. If such a policy were not upheld, the results could be adverse and severe for public entities, including, without limitation, inability to perform necessary functions due to diminished monetary resources resulting from having to pay a high or unexpectedly imposed special assessment.

School District does not deny that a court should interpret ambiguous statutes in a way that avoids constitutional questions. However, the California Supreme Court did not ignore that general rule in this particular case. Water District did not raise any constitutional issues that had to be avoided. Unlike the primary issue in *Young v. Haines,* 41 Cal.3d 883 (1986), the primary issues in the instant matter were decided without statutory aid or interpretation. Unlike the statutes in *Young,* the statutes which were examined were unambiguous. Unlike the minor plaintiff in *Young,* Water District failed to raise any constitutional issues at the earliest opportunity. Finally, the decision resolved the precise issues involved and no more. Constitutional questions were neither presented nor adjudicated and, thus, were avoided. There is no basis for concluding that the California Supreme Court failed to properly discharge its judicial duty.

III

THE DECISION OF THE CALIFORNIA SUPREME COURT DOES NOT MANDATE A VIOLATION OF THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT.

As stated above, this matter presented two basic issues of local (state) importance: (1) whether capacity fees are special assessments under California law and (2) whether School District, a state agency, was liable to Water District, a County agency, for payment of them. Those were the issues resolved. Since Water District failed to raise any constitutional issues in a timely manner, it cannot reasonably complain that such issues were not addressed. To base a petition for a writ of certiorari on a mere comment in a decision which did not resolve *absent* issues, as Water District has done here, is even more unreasonable.

Contrary to Water District's assertion, the California Supreme Court did not "mandate" any violations of the Fifth Amendment. It ruled that sewer capacity fees are special assessments from which School District, a public entity, is impliedly exempt according to well-established precedent. The court invited the California Legislature to examine the implied exemption and establish a new rule if it saw fit. That invitation is apparently being accepted by the Legislature.

Water District's argument about the purported violation of the Takings Clause of the Fifth Amendment is a bit opaque. It is not clear whose Fifth Amendment rights are supposedly threatened or exactly what the threat is. Water District is not entitled to base any claim on third persons' rights. It must be remembered that School District does pay a fee for having its buildings physically

connected to Water District's sewer lines (hook-up fee) and monthly service charges based on the amount of sewage discharged each month. Thus, School District pays for its actual, demonstrable use of Water District's facilities. It cannot reasonably be said that a violation of the Fifth Amendment Takings Clause has resulted from such conduct.

The ruling that School District is impliedly exempt from paying sewer capacity fees is a matter of state law and policy, not the Fifth Amendment. This case did not arise from a properly-mounted Fifth Amendment challenge to School District's status but from a dispute over whether School District owed Water District money for capacity fees. This simple dispute was resolved in School District's favor.

Water District's disappointment in the result has prompted it to attempt to expand this case into one of constitutional magnitude. What Water District appears to forget while claiming that School District is getting something for nothing (and thus allegedly violating *someone's* constitutional rights), is that the record in this case is entirely bereft of any proof that Water District has required increased capacity or, more importantly, that School District's use of Water District's facilities has been on the increase or caused any need for greater sewer capacity. The California Supreme Court ruled on the precise issues properly before it. Its decision has upheld state law and policy, not "mandated" violations of the Fifth Amendment. The decision was much more the result of application of precedent than construction of statutes. Interestingly, Water District has failed to specify the statutes which have purportedly been drawn into question.

Finally, as demonstrated above, Water District is not entitled to raise third persons' rights in seeking review of the California Supreme Court's decision, especially when there is an absence of harm.

IV

ASSUMING, ARGUENDO, THAT THERE HAS BEEN A CLASSIFICATION OF WATER DISTRICT'S CUSTOMERS, SUCH CLASSIFICATION FURTHERS LEGITIMATE INTERESTS, AND THE "RATIONAL BASIS" TEST IS PASSED.

Water District has waved the Equal Protection Clause violation red flag in hopes of attracting this Court's attention to a local dispute. This lure must fail for several reasons. First of all, Water District does not belong to the allegedly prejudiced class and is not entitled to base its challenge on third persons' rights. Secondly, the decision is based on non-statutory precedent, so Water District's recitation of principles of statutory interpretation is inapposite. Thirdly, the California Supreme Court's decision does not "mandate" any violation of the Fourteenth Amendment. The Court resolved the issues before it utilizing well-established judicial precedents. There was no Fourteenth Amendment issue to resolve, and accordingly, the Court did not engage in any Equal Protection analysis. Nevertheless, Water District claims that the California Supreme Court "classified" Water District's customers, and that such classification fails to withstand scrutiny under the "rational basis" test. Such a claim is based on a misinterpretive reading of the decision.

Assuming, *arguendo*, that Water District is the proper party to raise the purported violation of the Equal Pro-

tection Clause, there are legitimate interests which are well-served by the California Supreme Court's decision holding that School District is impliedly exempt from paying capacity fees, which were found to be special assessments. One of the chief interests was enunciated by the California Supreme Court in 1948: To prevent one tax-supported entity from siphoning tax money from another such entity. *Eisley v. Mohan*, 31 Cal.2d 637, 642 (1948). Protecting this interest furthers several other legitimate interests of mainly local concern. For example, it enables public entities to perform their functions free of interference or inability caused by reduced monetary resources. The assessed public entities may not be able to offset the special assessments by collecting an increased amount of revenue from their sources, thus facing an overall reduction of financial resources. Their ability to serve their constituents would suffer, with their constituents suffering the most harm in the long run.

It is also desirable for public entities to be protected from the uncertainty which would result from the inability to predict when a special assessment might be imposed or increased. Such uncertainty would make budgeting and planning even more difficult than they already are.

If some public entities were allowed to impose special assessments on other public entities, the former could freely appropriate the funds of the latter. This would interfere with the Legislature's appropriations process. Another negative result would be the loss of accountability. The source of funds for the assessed public entity is not always identical to the assessing public entity's constituency. Elected officials should be allowed to appropriate only such funds as they levy upon their constituents. There

is no basis for allowing elected officials to assess a public entity such as School District and thus indirectly exact contributions from non-constituents.

A final example of a legitimate interest is the avoidance of undue burden on the courts. Once imposition of one type of special assessment on one type of public entity is allowed, a precedent will be set. The assessed public entities will likely decide to legally challenge every special assessment with which they are faced in order to try to protect their limited financial resources.

All in all, upholding the public entity implied exemption from special assessments, as was done here, fulfills several legitimate state and local interests. Therefore, even if the rational basis test were applicable in this instance, the decision under attack would stand.

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CONCLUSION

The California Supreme Court correctly resolved the issues which were properly before it and did not mandate any violations of any provisions of the Constitution of the United States. Since the issues in the case did not present federal questions, and resolution of the issues did not call for or result from the interpretation or application of federal law, Water District's talismanic invocation of Fifth and Fourteenth Amendment violations is insufficient reason for this Court to exercise its discretion and issue a writ of certiorari. School District respectfully requests that the United States Supreme Court deny Water District's petition and award School District its costs.

Dated: January 15, 1987

Respectfully submitted,

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